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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~276~~ 8

MEMPHIS & CHARLESTON RAILWAY COMPANY, APPELLANT,

vs.

C. L. PACE, G. C. STEPHENS, R. C. GRISHAM, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FILED JULY 31, 1929

(34,407)

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[fol. a] [Caption omitted]

[fol. 1]

IN CHANCERY COURT OF TISHOMINGO COUNTY

M. D. 93. No. 1785

MEMPHIS & CHARLESTON RAILROAD COMPANY, Complainants,

vs.

OMER J. BULLEN et al., Defendants

ORDER SETTING CAUSE—Dec. 15, 1927

It is therefore ordered, adjudged and decreed that this cause be and the same is hereby set for hearing before Chancellor Allen Cox, at nine o'clock, at Iuka, Mississippi, on Dec. 28th, 1927.

This decree is entered by consent of all parties interested.

Decreed in open court this the 15th day of December, 1927.

Allen Cox, Chancellor.

[fol. 2] Appearances of counsel omitted in printing.

[fol. 3] IN CHANCERY COURT OF TISHOMINGO COUNTY

WRIT OF INJUNCTION AND RETURN—Filed May 18, 1927

The State of Mississippi to Omer J. Bullen, Sheriff & Tax Collector of Tishomingo County, by its Board of Supervisors, J. M. Page, R. C. Grisham, Elmer Locke, J. F. Oaks, and T. C. Pharr:

A Bill for an Injunction as hereinafter set forth, having been duly filed, with the fiat of the Hon. Allen Cox, Chancellor of the First Judicial District of said State, thereon indorsed, and approved, Injunction Bond having been given, you are hereby commanded and enjoined to desist from collecting the taxes of the Oldham Road District of Tisho-

mingo County levied by the Board of Supervisors against the Memphis & Charleston Railroad Company for the year 1926, and the said Board of Supervisors are enjoined from levying any other tax of the Oldham Road District against the Memphis & Charleston Railroad Company in said Oldham Road District.

This you will restrain from doing any of the foregoing acts until further orders of this court upon penalty of contempt.

You are further commanded to appear before the Chancery Court of this county of Tishomingo in said state, at a term thereof to be held at the court house in the town of Iuka, Mississippi, on the Second Monday *of* June 13th, A. D. 1927, then and there to answer the bill of complaint of Memphis & Charleston Railroad Company et al.

To which you are defendants.

Given under my hand and official seal, at Iuka, Miss., this the 17th day of May A. D. 1927.

T. J. Storment, Chancery Clerk, Tishomingo County, Mississippi.

[fol. 4] [File endorsement omitted.]

I have this day executed the within writ personally by delivering a true copy of the same to each of the within named defendants, to wit O. J. Bullen, Sheriff, R. C. Grisham, Elmer Locke, J. F. Oaks and T. C. Pharr, members of the Board of Supervisors, and by leaving a true copy at the place of abode of John M. Page with his wife, she being above the age of 16 years and willing to receive the same.

W. S. Brown, Coroner.

[fol. 5] In Chancery Court of Tishomingo County

Minute Entry

This case is taken up for hearing today, in the court house at Iuka, Mississippi, before Hon. Allen Cox, Chancellor, on its merits, in compliance with the former decree of the court, taking the same under advisement for trial and decree in vacation, and the cause having been postponed by consent from the date fixed in the original decree, and being

now taken up correspondingly for trial and final decree on its merits.

IN CHANCERY COURT OF TISHOMINGO COUNTY

AGREEMENT RE SUBSTITUTION OF PARTIES

It is agreed that the name of C. L. Page, who is now sheriff and tax collector, may be substituted *in* the name of Omer J. Bullen, as a defendant, and G. C. Stephens, who succeeded J. M. Page, and A. B. Long, who succeeded J. F. Oaks, as members of the Board of Supervisors, are hereby substituted as defendants in this cause.

The following pleadings were introduced and read as follows:

Original Bill, Amendment to Original Bill, Answer of the defendants, Omer J. Bullen and Board of Supervisors, Amended Answer, Supplement to Original Bill.

(All of which the Clerk will copy.)

[fol. 6] IN CHANCERY COURT OF TISHOMINGO COUNTY, IN VACATION, 1927

[Title omitted]

BILL OF COMPLAINT—Filed May 13, 1927

To the Honorable Chancery Court of Tishomingo County, Mississippi:

The complainant, the Memphis & Charleston Railroad Company, would most respectfully show unto the court that it is a corporation organized under and by virtue of the Laws of the State of Mississippi for the purpose of conducting a general Railroad business; and a resident citizen of said State; that the defendants are Omer J. Bullen, a resident citizen of Tishomingo County, Mississippi, who is Sheriff and Tax Collector of said County; and Tishomingo County, represented by its Board of Supervisors, J. M.

Page, President, R. C. Grisham, Elmer Locke, J. F. Oaks, and T. C. Pharr, resident citizens of Tishomingo County, Mississippi.

The complainant would further show unto the court that on the fourth day of January 1926, J. D. Curtis and others filed with the Board of Supervisors of Tishomingo County, Mississippi, a petition purporting to be signed by more than twenty per cent of the qualified electors of said described territory, asking that the same be organized into a road district under the provisions of Chapter 277, Laws of Mississippi, 1920; also requesting the Board of Supervisors to order an election to submit the proposal for the issuance of six thousand five hundred dollars of bonds on said described territory for the purpose of maintaining one or [fol. 7] more highways therein.

The complainant would further show unto the court that the said Board of Supervisors of Tishomingo County ordered an election to be held at the north Iuka voting precinct submitting the question of issuance of six thousand five hundred — bonds of said territory to the qualified electors thereof to determine whether said territory should come under the provisions of Chapter 277 Laws of Mississippi, 1920; and whether or not bonds of said proposed road district should be issued in accordance with the provisions of said law.

The complainant would further show unto the court that an order was entered, that notice of said election should be given according to the provisions of Chapter on Registration and Election as found in the Mississippi Code of 1906, and laws amendatory thereto, and the election commissioners of said County ordered to give notice of said election; and that the said election commissioners canvass the returns of said election and certify the result thereof to the said Board at the February meeting.

The complainant would further show unto the court that notice was given by said election commissioners in the "Vidette," a newspaper published in Tishomingo County, with a general circulation therein, for three consecutive weeks next to and prior to the date for the holding of said election, namely, January 30th, 1926, submitting to the qualified electors in said territory the question of issuing six thousand five hundred dollars of bonds for the purpose

of maintaining one or more highways in said territory as provided for under Chapter 277 of the Laws of Mississippi of 1920.

The complainant would further show unto the court that on the 30th day of January, 1926, said election was held at the north Iuka Voting Precinct, for the qualified electors of [fol. 8] said territory to vote on the issuance of said bonds and that at said election there were nineteen votes cast in favor of the issuance of said bonds; and three votes cast against the issuance of said bonds.

The complainant would further show unto the court that said election commissioners made their report to the Board of Supervisors of said county showing the result of said election for the issuance of said bonds as set out above.

The complainant would further show unto the court that the said Board of Supervisors, under the provisions of Chapter 277 of the Laws of 1920, appointed three road commissioners, namely D. H. Curtis, W. H. Yarber and Walter Thomas for said district.

The complainant would further show unto the court that said Board of Supervisors did enter an order upon their minutes creating and organizing a road district under the provisions of Chapter 277 of the Laws of 1920. And appointed the above named road commissioners for a term of four years from the date, and until their successors be appointed; the name of said road district to be Oldham Road District of Tishomingo County.

The complainant would further show unto the court that said road commissioners so appointed by said Board filed a report with the said Board requesting said Board to issue the bonds of Oldham Road District in the sum of Six thousand five hundred dollars, and directed the same to be sold to the highest bidder for cash, and the proceeds thereof to be used in the construction of the road in said district as provided by law; and set out in said request that six thousand five hundred dollars was less than fifteen per cent of the assessed valuation of the taxable property in said Road District.

[fol. 9] The complainant would further show unto the court that said Board of Supervisors did issue Six thousand five hundred dollars of Road bonds for the construction of roads in Oldham Road District of Tishomingo County, Mis-

sissippi, and the same were sold and the funds thereof placed in the County Depository, and were used in the construction of roads in said district.

The complainant would further show unto the court that Oldham Road District when so organized was described as follows:

Beginning at the center of section twenty, township three, range eleven, thence south to the southern boundary line of the Southern Railway right-of-way, thence in an easterly direction with the south line of the Southern Railway right-of-way to where the said line intersects the west line of section thirty-three, township three, range eleven, thence south with said line to the southwest corner of section thirty-three, township three, range eleven, thence east to the southeast corner of section thirty-four, township three, range eleven, thence north to the northeast corner of section twenty-seven, township three, range eleven, thence west to the northwest corner of section twenty-eight, township three, range eleven, thence north one hundred sixty rods to the northeast corner of the southeast quarter of section twenty, township three, range eleven, thence west one hundred sixty rods to the center of section twenty, township three, range eleven.

The complainant would most respectfully show unto the court that the original petition presented to the Board of Supervisors of Tishomingo County, on the fourth day of January, 1926, purporting to be signed by twenty per cent of the qualified electors of the above described territory did not contain the names of twenty per cent of the qualified electors in said territory.

[fol. 10] The complainant would further show unto the court that the order of the Board of Supervisors ordering the election to be held submitting to the qualified electors of said territory whether or not bonds in the amount of six thousand five hundred dollars should be issued was not according to law; that the notice given by the election commissioners for the purpose of notifying the qualified electors of said territory of the election to be held to ascertain whether or not six thousand five hundred dollars of road bonds should be issued or not, was not given according to law; that the election was not held at the place and time as provided by law; and that the report of the election commissioners given to the Board of Supervisors did not report

the actual facts of said election; that the appointment of the three commissioners by the Board of Supervisors of Tishomingo County was not according to law, but contrary thereto; that the report of the three proposed road commissioners of the proposed road district asking for the issuance of the said bonds was contrary to the law made and provided in such cases; and that the bonds so issued by the Board of Supervisors were more than fifteen per cent of the assessed valuation of the taxable property of said district or districts.

The complainants would further show unto the court that prior to the proposed creation of the road district, by the name of Oldham Road District of Tishomingo County, there was created a road district in Tishomingo County known as the Lee Highway Road District which is composed of the entire first district of Tishomingo County, and in addition thereto part of the second district known as the Burnsville Road District. A perfect description of said territory included in the Lee Highway Road District in the second district is hereto attached marked exhibit "A" and made a part of this bill of complaint.

[fol. 11] The complainant would further show unto the court that said County, and Supervisors District, and parts of Supervisors District included in said Oldham Road District had heretofore issued bonds in said County, Supervisors District, parts of Supervisors District to the amount of more than ten per cent of the assessed valuation of the said property in said county, Supervisors district, or parts of Supervisors District, and that the issue of six thousand five hundred dollars of Oldham Road District bonds is more than and in excess of the five per cent of the assessed valuation of said proposed road district, and that the assessed valuation of the property both real and personal in the Lee Highway in Tishomingo County during the year 1926, was $1,692,481.00; and that the Board of Supervisors issued $100,000.00 of road bonds of said Lee Highway Road District, and had previously issued other bonds in the territory described as the Lee Highway Road District for more than ten per cent of the assessed valuation thereof. The amount of said bonds heretofore issued on the said territory will be given in evidence at the trial of this case.

The complainant would further show unto the court that the Oldham Road District is composed of sections twenty-seven, twenty-eight, thirty-three and thirty-four; South-

east quarter of section twenty; and about two hundred forty acres on the west side of section twenty-nine; all in township three, range eleven, in Tishomingo County, Mississippi; that said real estate in said district is assessed at a value of $139,920.00; and the assessed valuation of the personal property in said district amounts to the sum of $34,660.00, or a total of $174,580.00, both personalty and realty.

The complainant would further show unto the court that there are about twenty-six qualified electors in said road [fol. 12] district who own property assessed as follows:

Real Estate	$13,320 00
Personal property	4,060 00
	$17,380 00

The complainant would further show unto the court that among those who own property in said district are the complainants The Memphis Stone & Gravel Company, a corporation engaged in the mining of gravel; the Tishomingo Concrete & Gravel Company, a corporation engaged in the mining of gravel; and the Allen Gravel Company, a corporation engaged in the mining of gravel; and the Mobile & Ohio Railroad Company, a foreign corporation which owns real estate in said road district assessed at seven hundred and fifty dollars. The Memphis & Charleston Railroad Company's real estate in said district is assessed at $113,200.00. These corporations as a whole own property in said road district assessed as follows:

Real estate	$126,600 00
Personal property	30,600 00
Or a total of	$157,200 00

None of the corporations had a vote at said election for the issuance of said bonds, because none of their officers or agents reside within said road district, neither did they have anything to do in determining what property or territory would be included in said district or what amount of bonds would be sold for the improvements of said district or where the roads so constructed should be built.

The complainants would further show unto the court that a majority of the qualified electors in said road district who

own less than $10,000.00 worth of the taxable property in said district could carry a bond issue in said territory.

The complainant would further show unto the court that the Lee Highway extends from Washington to the Pacific Coast and from Washington to Corinth, Mississippi, follows [fol. 13] along the right-of-way of the Southern Railway System and practically all of the way runs parallel and adjoining said railway system; and the purpose in the organization of the said district was to organize the various road districts along the right-of-way of the Southern Railway Company so that the Southern Railway Company and its leased systems would bear the greater portion of expense in the construction of the said Lee Highway.

The complainant would further show unto the court that Oldham Road District is composed of territory which lies within the Lee Highway Road District of Tishomingo County, and that the Lee Highway Road so constructed runs along just south of the right-of-way of the complainant's road bed, through Oldham Road District and that said Lee Highway is a first class road with a twenty foot crown, covered with gravel, and kept in first class condition by the State highway for the use and convenience of the traveling public.

The complainant would further show unto the court that the said road commissioners of Oldham Road District with the consent of Board of Supervisors of Tishomingo County adopted Chapter 280 of the laws of 1920 and purchased material, equipment, machinery, paid for grading and hauling necessary for the construction of the said road, employed and hired labor, and teams necessary for the construction of the said road, and constructed the same in a general northwesterly direction and north of and parallel to the road constructed by the Lee Highway Road District; that said roads were not laid out according to the law and the Civil Engineer did not survey and estimate the cost of each mile of said road; and no such report is made a part of the minutes of the Board of Supervisors nor was any such report made by any such Civil Engineer to the Board of Supervisors; nor does any such report appear spread on the minutes of the Board of Supervisors; that [fol. 14] said Oldham Road District bonds were sold and the money obtained therefor was spent contrary to law, and without any authority of law by the Board of Su-

pervisors of said County; that said road so constructed in Oldham Road District joins Lee Highway Road, so that one driving these roads so constructed can pass over the Lee Highway Road, and pass in a northeasterly or southeasterly direction and come back on the Lee Highway; that said road is in a territory very thinly settled or populated; the top soil mostly being gravel, out of which the roads through this County are being constructed; and the natural gravel is lying on the top of the surface and makes a good road without being constructed by man. The natural gravel in this section of the county and the top surface of the ground made good roads without any construction, the same being solid gravel for many feet under the top of the surface.

The complainant would further show unto the court that when the Board of Supervisors of Tishomingo County issued bonds of said district, the Board failed to fix the amount of the annual installments to be paid each year to redeem said bonds.

The complainant would further show unto the court that the three commissioners as selected by the Board of Supervisors of said Road district failed to employ a competent civil engineer to survey and lay out the road or roads in such district, and that said civil engineer failed to make an estimate of the cost of the construction and maintaining such highway or highways for each separate mile covered by such survey; and failed to report such survey and estimate to the commissioners before the work of construction of said road was begun or afterwards; and the said commissioners failed to report said report to the Board of Supervisors and said Board of Supervisors failed [fol. 15] to file said report among the records of its office; and failed to have the same spread on the minutes of the Board, and failed to enter an order approving such survey.

The complainant would further show unto the court that the Board of Supervisors levied a tax in 1926 against the taxable property in Oldham Road District for the purpose of paying off the maturing bonds in said district and said tax was invalid and void.

The complainant would further show unto the court that said election for the issuance of said bonds for the Oldham Road District was not held according to the provisions of

the Chapter on Registration and Election of the Code of 1906.

The complainant would further show unto the court that it is the largest tax payer in the Lee Highway District; that the Lee Highway runs parallel with its right-of-way and it is now assessed at the rate of $35,000.00 per mile for each mile of track which it has in said road district; that it pays more tax towards keeping up said Lee Highway and paying off the bonds thereof and interest on the accrued bonds than any other taxpayer in said district, and that said Road District is of no benefit at all to the complainant, but on the other hand furnished a thoroughfare upon which bus lines and trucks are run, which haul passengers and freight for hire in direct competition to the interest of the complainant. It is forced under the law of Mississippi to pay tax to keep up a road for its competitors, and for which it receives no benefit whatever.

The complainant would further show unto the court that it is the heaviest taxpayer in Oldham Road District, that its property is assessed in said road district at $113,200.00 and that the entire assessed value of all the property in the district is only $174,580.00, and that all of the other tax-[fol. 16] payers in said road district have property in said district assessed at $61,380.00; that the road so laid out and constructed in said district runs parallel with the right of way of complainant's road bed; that if said tax so levied by the Supervisors is collected it will be required to furnish a road for its competitors for transportation, and that bus lines trucks and other competitors will use the same in direct competition to the complainant, and the complainant will be building a road for transportation for its competitors, and will receive no benefits whatever from the construction of said road, but on the other hand has been greatly damaged.

The complainant would further show unto the court that said district was organized under Chapter 277 of the Laws of 1920, which provided that the Board of Supervisors of said County shall levy annually a special tax upon all the taxable property of such districts to be exclusively used in paying the interest on such bonds and providing a sinking fund for their redemption that said tax is contrary to law, in that it is a special tax, when the Board of Supervisors only have authority to levy a general tax.

The complainant would further show unto the court that said Oldham Road District was not created by the Legislature of the State of Mississippi, nor did it delegate its authority to any corporation for the purpose of organizing such a road district, but the amount of said bonds and the territory included was wholly within the discretion of the petitioners; that there is nothing in the law to guide or limit the action of the signers of the petition in selecting the property to be assessed, nor the property included within said district, but the same is left to their own choice and their designation is absolute; and that the Board of Supervisors is required under the law to levy a tax in the dis- [fol. 17] trict sufficient to pay the entire debt as it matures; that this complainant has had no opportunity to appear in any court to file its objections to the organization of the Oldham Road District nor is any court provided under the law which it can file objections to the assessment made against its property by the Board of Supervisors in the organization of the said district, neither does the law provide any notice to be given to this complainant; that a road district is being organized; and that said assessment was not according to the benefits derived, if it were complainant's property would not have been assessed as it was not benefited at all. No tribunal was empowered by this law to hear objections to the organization of the district or consider and determine whether or not the improvements in said district would benefit its property.

The complainant would further show unto the court that Omer J. Bullen, sheriff and Tax Collector is proceeding to collect the tax so levied against its property in Oldham Road District, and that this complainant has refused to pay said tax because the same is void, and contrary to law, and that said tax collector has levied upon its property in said district and is now proceeding to sell the same, and unless this court enjoins the sale thereof this complainant will suffer irreparable injury and great damage.

The complainant would further show unto the court that Chapter 277 of the Laws of 1920 and amendments thereto are unconstitutional in that the law violates the Fourteenth Amendment to the Constitution of the United States in that it deprives this complainant of its property without due process of law. It fails to provide for notice of the organization of said district. The said law does not pro-

vide any court in which a taxpayer or qualified elector can file objections to the organization of the road district, nor [fol. 18] objections to the assessment levied against his property in the event his property is not benefited by the improvements. This law does not provide any court or tribunal to which a taxpayer can go where his property has been damaged by the construction work to estimate the amount of damages, and have the same estimated by a jury of his piers. The same is unconstitutional in that it violates the Fourteenth amendment to the Constitution of the United States in depriving persons of their propery without due process of law.

The complainant would further show unto the court that after the decision handed down by the Supreme Court of the United States in the Browning case declaring the road law of the State of Texas unconstitutional the Legislature of the State of Mississippi undertook to cure this defect in Chapter 277 of 225 of the Laws of 1926. Chapter 225 of the Laws of 1926 is not an amendment to Chapter 277 of the Laws of 1920, but is an act providing a method for the organization of road districts in Mississippi for the purpose of constructing, maintaining or repairing roads. It is a law under which road districts may be organized independent of any other law. It is a complete system for the organization of the road district. It provided that notice shall be given by the Board of Supervisors of its intention to create a road district; to issue bonds and to levy a tax to construct and maintain or repair roads therein. Thus notice shall fix a time and place at which the Board will hear objections to the creation of said district. The law provides the Board shall hear remonstrances, objections to the creation of said road district; and shall pass upon and determine the sufficiency of the petitions and said Board is vested with authority to exclude from said district any lands which should not be included. This law attempting to cure the unconstitutionality of Chapter 277 of the Laws of [fol. 19] 1920 is itself unconstitutional in that it fails to provide a court or tribunal in which a tax payer may come and file objections to the assessment levied against his property when the assessment is greater than the benefits his property will receive from the improvement which fails to provide a court in which a tax payer may come to de-

termine the damage done his property in making the improvements.

The complainant would show unto the court that the Legislature of Mississippi, to overcome the defect of Chapter 277 of the Laws of 1920 enacted chapter 278 of the Laws of 1926, an act creating and validating the creation and organization of separate roads districts, fixing and confirming the boundaries thereof, validating the authorization, issuance and sale of bonds thereof, and the contracts and agreements made by the Board of Supervisors, authorizing the performance of contracts and payment therefor, providing for the issuance of additional bonds and providing for the payment of bonds and authorizing the levy of taxes for constructing and maintaining of roads therein, and payment of bonds therefor.

The Legislature undertook to validate each and every act necessary in the organization of, the issuance, the sale of bonds of, road districts including the minutes of the Board of Supervisors in the creation, issuances and sale of bonds, letting of contracts, issuance of warrants and everything done or could be or may be done by the Board of Supervisors and the Road Commissioners in and about and concerning road districts.

The Legislature realizing its inability to declare an act or law constitutional which was unconstitutional empowered the Board of Supervisors to pass orders and to do any and all things deemed advisable by them to validate any separate road and taxing district heretofore created, the bonds of said district and to issue bonds in lieu of [fol. 20] the ones already issued and to validate any and all tax levies, contracts or any other things done by the Board of Supervisors in the creation of said district, the issue and sale of the bonds, levying of taxes, and the building and maintenance of roads thereof. In other words the Legislature undertook to give the Board of Supervisors authority to do that which the Legislature could not do itself.

The complainant would show unto the court that the Legislature of 1926 enacted Chapter 280 to validate the creation of any and all taxing districts in the State of Mississippi, to validate all bonds, notes, certificates of loans or other obligations, issued by any taxing district in the State

of Mississippi. In other words, it was the purpose and intent to validate everything that had been done by any kind of a Board in any taxing District.

The complainant would show unto the court that the Legislature of Mississippi enacted Chapter 282 of the Laws of 1926 an Act to validate all acts, proceedings, orders, and resolutions of Board of Supervisors and Road Commissioners of Road Districts in the matter of the sale of bonds and the price received therefor and the employment and payment of agents to sell the same where such County Bonds and Road Bonds were sold, and the consideration therefor paid more than three years prior to January 1st, 1926, and abating all suits.

The complainant would show unto the court that each of the acts of the Legislature of 1926 referred to above is unconstitutional, in that, none of them provide any means for a tax payer to file objections to the organization of a road district or file any objections to the assessment made upon his property whether the said property is benefited by the improvements or not, and each of them deprive the [fol. 21] complainant of its property by the tax so levied by the Board of Supervisors of Tishomingo County during the year 1926 without due process of law and each act violates the Fourteenth Amendment of the Constitution of the United States.

The complainant would further show unto the court that unless the said Omer J. Bullen is enjoined from collecting said tax so levied upon its property in Oldham Road District for the year 1926, and unless the Board of Supervisors of said County and their successors in office are enjoined from levying taxes on its property in Oldham Road District for the purpose of paying off the bonded indebtedness of said Oldham Road District that its road bed running through the said road district and its property will be sold for said invalid tax and the complainant will be required to pay said tax without receiving any benefit whatever from the construction of the said roads in said district, and without having any right to object to the organization of said district or file any objections to the assessment so levied by the Board of Supervisors to pay off the indebtedness of the bonds of the said district, and it will suffer irreparable injury.

The complainant would further show unto the court that its property was assessed by the Board of Supervisors of Tishomingo County for the year 1926 so that its amount due the Oldham Road District, if the same was valid, amounts to the sum of $450.00; that said Omer J. Bullen has levied upon its property in said road district for the payment of said district and unless he is enjoined from selling the same he will sell the complainant's rolling stock so levied on in said district to the great damage and injury to the complainant and it will suffer irreparable loss and injury unless he is so enjoined and the complainant has no complete, adequate and perfect remedy at law to prevent the said tax from being collected by the said Sheriff and Tax Collector.

[fol. 22] Premises considered the complainant prays that all proper process of this court do issue commanding the defendants and each of them to appear before this court at its rule day in June, it being the 13th day of June, 1927, at the courthouse in Iuka, Mississippi and then and there plead, answer or demur to this bill of complaint but answer under oath is hereby expressly waived, and that upon a final hearing of this cause this court declare Chapter 277 of the Laws of 1920, and amendments thereto; and Chapter 225 of the Laws of 1926; and Chapter 278 of the Laws of 1926; and Chapter 280 of the Laws of 1926; and Chapter 281 of the Laws of 1926, and Chapter 282 of the Laws of 1926 to be unconstitutional, and that this court grant its writ of injunction enjoining the said Omer J. Bullen from collecting said tax, and the Board of Supervisors of Tishomingo County from levying said tax and perpetually enjoining them from collecting the said tax of said Oldham Road District, and to declare the same a void tax, and

It prays for, such other, further, more general, different or specific relief as the court may deem just and right and in duty bound it will ever pray, etc.,

Ely B. Mitchell, Attorney for the Complainant.

[fol. 23] *Duly sworn to by Ely B. Mitchell. Jurat omitted in printing.*

To the Chancery Court of Tishomingo County:

Let the injunction issue as prayed for upon complainant entering into bond according to law in the sum of $1,000.00; the bond to be approved by you.

This May 14, 1927.

Allen Cox, Chancellor.

[File endorsement omitted.]

[fol. 24] In Chancery Court of Tishomingo County

[Title omitted]

Motion to Amend Original Bill—Filed May 30, 1927

Now comes the complainant in the above-styled cause and moves the court to allow him to amend his declaration so that the original bill filed in this cause shows the following.

Appearing as the first paragraph on page seven of said bill:

Ely B. Mitchell.

Amendment

The complainant would further show unto the court that there are about 3,020 acres of land in Oldham Road District, assessed at $139,920.00, that the complainant owns about thirty-six and forty-five hundredths acres of land in said road district, the assessed valuation of which is $113,-200.00. That the other lands in said district except that of the complainant is assessed at $46.33 per acre, while the land of the complainant is assessed at $310.56 per acre. The land of the complainant is assessed six and seven-tenths times more per acre than any of the other land in said road district. The assessment made against its land in said road district is plainly arbitrary, and unreasonable and discriminatory, the assessment was excessive in itself, or when compared with the assessment against other prop-

[fol. 25] erty.

It is a violation of the due process and equal protective clause of the Fourteenth Amendment to the Constitution of the United States.

The Complainant would further show unto the court that on account of the construction of said road it has become a feeder to the Lee Highway and both of said roads are used for hauling freight and passengers and now are hauling freight and passengers which were before the construction of said roads hauled by the *the* complainant, that as a result its revenues have been reduced instead of increased by the construction of said roads; and the construction of said roads have been a detriment and injury to the complainant instead of a benefit.

[File endorsement omitted.]

[fol. 26] In Chancery Court of Tishomingo County

[Title omitted]

Amended Answer—Filed Dec. 12, 1927

To the Honorable Chancery Court of said State and County:

Comes now the defendants herein, Omer J. Bullen, J. M. Page, President of the Board of Supervisors, R. C. Grisham, Elmer Locke, J. F. Oaks, and T. C. Pharr, and admit that Omer J. Bullen is and was Sheriff and Tax Collector in and for Tishomingo County Mississippi, at the time and for the period alleged in Complainant's bill, and that J. M. Page is a member of the Board of Supervisors and President thereof, as alleged, in and for said County; that T. C. Grisham, Elmer Locke, J. F. Oaks, and T. C. Pharr are members of the Board of Supervisors of said county at and for the period of time alleged in Complainant's bill, and all of them serving full terms for the current term;

They admit that the Memphis & Charleston Railway Company is a corporation organized under and by virtue of the laws of the State of Mississippi for the purpose of conducting a general railroad business, and as such it main-

tains its lines and under the contemplation of the law is considered a citizen of Tishomingo County, Miss.;

The defendants admit that a petition was filed by the said Curtis and others in January, 1926, with the said Board of Supervisors seeking to have the territory herein [fol. 27] described, organized into a separate road district under the provisions of Chapter 277 of the Laws of Mississippi of 1920, which petition they admit requested an election to submit the proposal to the qualified electors of the said territory to see, decide, and determine whether or not they desired the proposed issuance of $6,500.00 of bonds on said territory for the purpose of maintaining one or more highways; and they aver that said petition was signed by the number of citizens required by law to make it in every way regular and valid, and that thereupon the said Board of Supervisors ordered an election at the north Iuka voting precinct, and that the issue of whether or not said bonds should be issued and sold and used, as aforesaid, was duly, regularly, and in the proper way submitted to the qualified electors of said district in every way as required *as* said chapter; that proper notice was given to the Election Commissioners, as provided by law, and that the Election Commissioners issued all necessary and proper notice of said election; that the election was held as alleged and the returns canvassed by the said Commissioners, and the results of said election certified to the Board of Supervisors in the regular way and in every way as provided by law; and that all publications, both by the Boar*e* of Supervisors and the said Election Commissioners, appeared in the said Iuka Vidette, as alleged, the same being a newspaper of general circulation in the said district and county as alleged; that the said election was held on the 30th day of January, 1926, as alleged; and that the same was duly, properly, and regularly submitted; that there were nineteen votes cast in favor of the issuance of said bonds and three votes against the same, as alleged.

They admit that the said Board of Supervisors, did, under the provisions of Chapter 277 of the Laws of 1920, appoint the said three commissioners as alleged, and that [fol. 28] the said Board of Supervisors made and entered its order creating and organizing the said territory into a separate road district under the provisions of the afore-

said chapter and designating and nominating the said district the Oldham Road District of Tishomingo County, or to that effect.

They admit that the said Commissioners filed a report with the Board seeking to have bonds issued of the Oldham Road District in the sum aforesaid, and directing that the same be sold, as aforesaid and directing that the proceeds be used for the construction of one or more highways, as aforesaid, and alleged and set out that the same was less than 15% of the assessed valuation of the taxable property in said road district, as alleged.

Defendants admit that the said Board of Supervisors did issue bonds in said amount on the said Oldham Road District of Tishomingo County for the said purpose and sold the same in manner provided by law, and placed the money in the county depository and the same was used in the construction of one or more roads in said district;

The defendants admit that the said description of the said territory included in said district is correct as set out and alleged in complainant's bill.

They deny that the said original petition contained less than 20% of the signatures of the qualified electors of said territory but in fact contained more than 20%.

They deny that the notice given by the Election Commissioners was in any way irregular, but aver that it was made as provided by law;

They deny that the election was not held at the place and time provided by law;

They deny that the said report of said Election Commis- [fol. 29] sioners was tainted with fraud or varied from the actual facts, or that it was in any way untrue or incorrect;

They deny that the appointment of the said three Commissioners was irregular or improper;

They deny that the report of the said Commissioners requesting the issuance of said bonds was irregular or improper in any way;

They deny that the obligations created by the issuance of said bonds and the sale thereof exceeded the limit provided by the said chapter in such cases, or that the same was more than 15% of the assessed valuation of the taxable property of the said district.

The defendants admit that prior to these proceedings and the creation of the said Oldham Separate Road District there had been created a separate road district in the said county known as the Lee Highway Road District, covering and composing the entire first district of Tishomingo County, together with a portion of the second Supervisors' District, known as the Burnsville Road District, as alleged by Complainants' bill; and that the said description of the said Lee Highway is properly set out and described in Complainants' bill.

The defendants admit that the said Lee Highway Road District had already issued bonds for road purposes, as alleged by Complainants' bill; but they deny that the issuance of the said $6,500.00 of bonds on the Oldham Road District of said County is more than and in excess of the 5% of assessed valuation of said proposed road district; and they deny that the assessed valuation of the property, both real and personal, against the Lee Highway Road District and against the Oldham Road District amounted to $100,000.00;

[fol. 30] They deny that the assessed valuation of the taxable property within the said Lee Highway Road District was not in excess of the amount alleged by Complainants' bill, to-wit: $1,692,481.00.

The defendants admit that other bonds had been issued on parts of the territory known as the Lee Highway Separate Road District, but they deny that they were assessed for more than 10% of the assessed valuation thereof.

The defendants admit that the said Oldham Good Road District has a valuation at the time alleged of only $139,920.00, as alleged, of real estate, and that the valuation of the personal property only amounts to $34,660.00 as alleged; but they admit that there are about twenty-six qualified electors residing within said territory; but they deny that the assessed valuation of their property only amounts to $13,320.00 and that their personal property only amounts to $4,060.00, and that the total valuation of the property owned by the said qualified electors totals only $17,380.00.

The defendants deny that the Memphis Stone & Gravel Company is a complainant to this bill; and they deny that the Tishomingo Concrete & Gravel Company and the Allen Gravel Company are complainants to this bill, and that the

Mobile & Ohio R. R. Co., is a complainant to this bill; and they deny that the Memphis & Charleston Railway Company's, complainants, real estate is assessed at $113,200.00; and they deny that the other said named corporations own real estate to the amount of $126,600.00 and personal property to the amount of $30,600.00;

But defendants admit that none of the said corporations were provided an opportunity to vote at the election aforesaid, or to say what property should be included in said petition; but they deny that they had no opportunity what-
[fol. 31] ever to appear and to have a voice in determining what territory should be included in the Board's order creating said separate road district upon which bonds were issued and sold to create roads as aforesaid, but on the contrary they had all the right and remedies made and provided by the said chapter;

They admit that the qualified electors in said Oldham Road District could carry an election in favor of the issuance of bonds, as alleged, regardless of the amount of real and personal property owned by them;

They admit also that the Lee Highway purports to extend from the city of Washington to the Pacific coast and from Washington to Corinth, Mississippi, but they deny that it follows along the right-of-way of the Southern Railway system, and that it practically runs parallel and adjoining the said railway system;

They deny that the purpose of the said organization of the said district or any of the said various road districts along or adjacent to the Southern Railway Company have been organized in a way to prejudice the Southern Railway Company or so that they should bear the greater portion of expense in the construction of the said Lee Highway or any other highway.

Defendants would further show unto the Court, especially that the Oldham Road District has done no such thing; and they deny in toto the said charges in so far as they apply to the Oldham Separate Road District.

The defendants admit that the Commissioners of the Oldham Separate Road District, with the consent and direction of the Board of Supervisors of said County, built the said road under the terms and provisions of Chapter 280 of the Laws of 1920 in manner alleged, except that they deny

that said roads were not laid out according to law; and they deny that they were not surveyed, and that all the [fol. 32] necessary estimates of cost per mile, etc., were not made so as to comply with the terms and conditions of the law as made and provided.

They deny that the proper reports as required by the law are not on the minutes of the Board of Supervisors; and they deny that any reports required by the civil engineer under the terms of the law were not complied with; and they deny that the money was spent contrary to law which they obtained through the sale of those bonds;

They admit that said road so constructed in Oldham Road District joins the Lee Highway so that one driving these roads so constructed can pass over the Lee Highway in a certain direction and come back on the Lee Highway; but the defendants admit that the same is true of the Railroad Company's track, and they deny that this has nothing whatever to do with the validity of said bonds;

They deny that the said road is in a thinly settled community and they deny that the top soil is mostly gravel, and that the roads are being constructed out of the top soil of the lands of said district; and they deny that the said native gravel constitutes a natural gravel road and that road construction is unnecessary; but on the contrary they allege that road construction is necessary and that the roads of said Oldham Road District do not have a natural gravel bed for construction.

They deny that when the bonds were issued of said district that the Board failed to fix the amount of the annual installments to be paid each year to redeem said bonds, but on the contrary they aver that any and all orders necessary to carry out the obligations created by the said bonds have been, are now being, or will be, passed, done or performed as made and provided by law;

[fol. 33] They deny that the said Commissioners failed to comply with the law in the employment of a civil engineer to survey and lay out said road or that the law was violated by any failure of the filing of an estimate by any civil engineer of the construction of said highway or highways, either in separate miles or as a whole; they deny that said engineer failed to report such survey and estimate to the Commissioners before the work of construction of said

road was begun or afterwards; and they deny that said Commissioners failed to report any matter or think to the Board of Supervisors touching the validity of said bond issue, but aver that all necessary reports were made and all necessary steps were taken and things done as made and provided by law. They deny that any necessary order was not passed approving a proper survey.

Defendants admit that the Board of Supervisors levied a tax in 1926 against the taxable property of the Oldham Road District for the purpose of paying off such portion of obligations as was then about to become due but they deny that such tax levy was invalid or void.

Defendants deny that said election for the issuance of said bonds of said Oldham Road District was not held in accordance with the law made and provided by statute under the Chapter on Registration and Election.

Defendants admit that the Lee Highway runs somewhat parallel to the right-of-way of the Complaining Railway Company, but they are not advised as to whether or not the said complaining Railway Company pays more tax in keeping up said highway and paying off the bonds thereof and interest than other tax payers in said district; but they deny that the said complaining Railway Company derives no benefit; and they deny that it furnishes a thoroughfare for bus lines and trucks in competition with the interest of [fol. 34] the complaining Railway Company or that it is forced under the laws of Mississippi to pay taxes to keep up a road for competitors and for which it received no benefit;

They admit that the complaining Railway Company is the heaviest tax payer in the Oldham Road District, but deny that it pays on $113,200.00 valuation; and they deny that the total valuation in said district is only $174,580.00; they admit, however, that the road constructed out of the proceeds of said bonds does not run in a general way parallel with the right-of-way of Complainant's road bed but deny that the said Railway Company would unjustly or unlawfully be required to furnish a road for its competitors, including bus lines and other competitors who do business in competition with the said Railroad Company; and they deny that it will receive no benefit by the construction of the said road or that it does not receive equal benefits.

They admit that it is provided in the record that the Board of Supervisors shall levy annually a special tax upon all the taxable property of the said Oldham District to be used exclusively in paying the interest on said bonds and to provide a sinking fund for their redemption, but they deny that said tax is contrary to law, that it is a special tax, or that the Board of Supervisors has not the authority to levy such a tax;

They deny that the Legislature in passing the said Act did not provide a suitable and adequate remedy for any and all corporations by which they might take care of their interest and rights under the statute in the organization of such separate road districts; and they deny that none of the matters and things binding on complainant were wholly within the discretion of the petitioners or that their designation was in any way absolute; and they deny that Complainants had no authority to appear and file their objections to the organization of said district; and they deny that [fol. 35] there is no provision through which they may appear and offer objections to the improper assessments made against their property by the Board of Supervisors; and they deny that no notice was given Complainant in the organization of said district; and they deny that the assessment was not strictly in accordance with the benefits; and they deny that Complainant's property was not benefited and should not have been assessed; and they deny that no tribunal was empowered by this law to hear objections to the organization of the district or to consider and determine whether or not the improvements in said district would benefit its property.

The defendants admit that Omer J. Bullen, Tax Collector, is proceeding to collect the tax so levied against its property in Oldham District, and that the Complainants have refused to pay said tax because the same was alleged by them to be contrary to law;

They admit that said tax collector has levied upon its property in said district in the regular way and is proceeding in the regular way to sell a sufficient amount of its property to satisfy its taxes and will do so unless enjoined, but not to the great damage of Complainants.

The defendants deny that said Chapter 277 of the Laws of 1920 together with the amendments thereto, are unconstitutional and violate any of Complainants' constitutional

rights, or that they violate the due process of law in the constitution, and deny that it fails to provide notice of the organization;

They deny that said law does not provide all tax payers the right to appear in court and have their day and be heard on their objections, either as to the organization of the district or as to the proposed assessment levied or to be levied against the property;

[fol. 36] They deny that it fails to provide ample court facilities to determine benefits or to have the same estimated as required by law; and they deny that it provides for depriving persons of their property without due process of law. They admit that the Legislature of the State of Mississippi enacted Chapter 255 of the Laws of 1926, but they deny that said chapter is not an amendment to Chapter 277 of the Laws of 1920. They deny that it is a complete system for the organization of a road district without reference to any other statute or independent of any other law. They admit that it provides notice as alleged, to be fixed as to the time and place as alleged; and they admit that said act provides for the hearing of remonstrances and objections to the creation of said road district and that the Board should pass upon and determine the sufficiency of the petition with authority to exclude any portion of the lands thought to be improper to be included; but they deny that the said law is unconstitutional in failing to provide any further necessary tribunal to which a tax payer may come and file objections to the assessment levied against its property when objectionable or improper, or that it fails to provide the proper court to which a tax payer may come to determine damages done to his property in making improvements, etc.

Defendants admit that the Legislature of the State of Mississippi enacted Chapter 278 of the Laws of 1926 as alleged; but they deny that said Act was created for the purposes alleged; but they do admit that said Act had effect to validate the proceedings here in question. They admit that the Legislature of the State of Mississippi empowered Boards of Supervisors to pass orders and to do any and all things approving advisable by them, to validate any separate road or taxing district theretofore created or bonds of said district to issue bonds in lieu of those already issued, [fol. 37] and to validate any and all tax levies, contracts

or any other things done by the Board of Supervisors in the creation of said district, and other matters and things as alleged.

They deny that by any of the said Acts referred to and described by the said Complainants that the Legislature of Mississippi was actuated by any purpose to evade the constitutional rights of any of the citizens of Mississippi or any other person in any of their property rights whatever; and they deny that any of the Acts referred to are unconstitutional in so far as they apply to the issues here joined. They deny that none of them provide any means for tax payers to file objections when property is not benefited or the issuance of bonds not desirable or anything improper; and they deny that because and on account of any of the said Acts complained of, as aforesaid, the said tax levy issued against the said property of Complainants in the district aforesaid in the year 1926 or any other date, it is invalid, improper, or violates any of the intendments of the due process of law or any of the guarantees afforded citizens in the Fourteenth Amendment to the Constitution of the United States.

They admit that unless enjoined from doing so, the taxes so levied in the said year will be collected and unless the Board of Supervisors of said County and their successors in office are not enjoined from doing so, they will annually lay a levy on the real and personal property within the said Oldham Separate Road District for the purpose of liquidation of such bonded indebtedness of the said Olsham Road District, and unless said property holders in said district shall pay and satisfy the taxes so levied against their property, that the usual and regular levies and sales will follow as made and provided by statutes; but they deny that any of the property holders will suffer irreparable loss.

[fol. 38] Defendants deny most emphatically that the Complainant, the Memphis & Charleston Railroad Company, has any undue, unjust, or extraordinary burdens of taxes placed upon it by the collection of the said taxes; that while it pays a greater portion of said taxes than any other one person or corporation within the said Oldham Road District, it nevertheless has corresponding benefits and derives advantages and benefits from the project for which said obligations were created entirely out of proportion to the advantages and benefits received by the general public or

any other persons, tax payer, or corporation connected therewith.

The Defendants aver that the said Complainant, the Memphis & Charleston Railroad Company, is wholly estopped to come into a court of equity and ask to have the said Omer J. Bullen, Sheriff and Tax Collector, enjoined from the collection of the taxes aforesaid by its conduct in the premises and by the laches with which its conduct has been characterized and because its position in this lawsuit is wholly at variance with the position it occupied at the time when it was its duty to speak and when it failed, refused, and neglected to speak, if indeed it had any right at all to complain.

Notwithstanding, the said Memphis & Charleston Railroad Company had all due and proper notice of the organization of said district and the creation of said obligations by the said Defendants, the Board of Supervisors of Tishomingo County, for and on behalf of the said Oldham Road District, the said Memphis & Charleston Railroad Company failed, refused and neglected to avail itself of its privileges to appeal said cause and to have the judgment of the Board of Supervisors in fixing upon its property this tax burden now complained of, and allowed the same to be finally adjudicated and made final, in which it acquiesced; and if it did not know of all these matters and things aforesaid, it was its business to know, and it is [fol. 39] chargeable with knowledge in due course and under ordinary diligence and care; and after the organization of said district, and after the issuance of said bonds, the said bonds were sold under the most unusual, delicate circumstances, to-wit: At the time when the minds of all men were directed to the bond issues of Mississippi by and on account of the general notoriety projected by the handing down of the opinion in the case of Browning vs. Hooper by the United States Supreme Court and at a time when all the states in the Union were readjusting their obligations and the Legislatures of most of the states were active in passing validation acts, stabilizing and making permanent and fixing a stability of obligations in the bond realm connected with road districts, school districts, and other similar taxing districts. The Memphis & Charleston Railroad Company could not escape knowledge under the general notoriety of the passage of the general validation act by the

Legislature of the State of Mississippi, cited and referred to in complainant's original bill, and of the special validation acts relative to the said Oldham Road District passed by the Legislature of the State of Mississippi in the acts of 1926, Chapter 1080, taking effect on the 11th day of March, 1926;

Also they had full notice of the Acts of the Legislature of the State of Mississippi referred to and cited in the original bill in this cause, authorizing, empowering, and directing the various Boards of Supervisors, the acting official organizations for various counties in the State, to validate, ratify, and affirm bond issues issued by the various Boards of Supervisors of various counties of the State for and on behalf of the various taxing districts of the State. Yet, in the face of all this, the Memphis & Charleston Railroad Company, Defendant, acquiesced, raised no [fol. 40] protest and no objection, served no notice to the Board of Supervisors of Tishomingo County, Mississippi or to the commissioners of the said Oldham Road District of Tishomingo County, Mississippi, nor to the general public of its intention to contest the validity of the said bonds and the acts of the Board of Supervisors in making levies to meet the obligations incurred by and under the terms and conditions of *d*aid bonds, but stood idly by and allowed the bonds to be sold to innocent purchasers for value, to be put upon the market at par, and at the same time they stood idly by and saw the money collected and had on behalf of said district, and saw the said Board of Supervisors, and the said Road Commissioners expend said money in and upon said road complained of for the benefit, profit, and advantage of the said Memphis & Charleston Railroad Company, and which materially contributed to its assets and revenues;

That the said Memphis & Charleston Railroad Company ought not to be heard at this time on account of its own attitude and conduct and advantages had and received and appropriated to their own use at the issuance and sale of said bonds, or complain of any levy made by the Board of Supervisors consistent with the obligations incurred by the terms and conditions of said bonds.

The said special validation act passed by the legislature under chapter 1080, taking effect on the 11th day of March, 1926, aforesaid, makes and constitutes the Oldham Road

District and all the obligations and undertakings incurred by the terms and conditions of said bond, the creature and the act of the Legislature of the State of Mississippi, and gives it a permanent status as such.

In response to the allegations of Complainant's amendment to the original bill, the defendants admit that the real [fol. 41] estate of the complainants company is assessed at a higher valuation per acre than other lands in said district, but that it is altogether because of the actual higher valuation of the said real estate of the said complaining company; that the assessments of the various lands in and of the said district were duly, properly, and regularly levied for the year complained of by the Board of Supervisors of Tishomingo County, Mississippi, and were duly and regularly passed upon by the State Tax Commission of the State of Mississippi, as provided by statute, and that all due and proper notice was had and published in the manner required by law to any and all tax payers of the said Oldham District in the County of Tishomingo, including the complainants, in which a day was set and complainants given their day in court to show, if they could, whether the assessment placed against their real estate was equitable, fair, and just, and the same was heard by the Board of Supervisors Court in said County on said notice, and it was adjudged by the said Board of Supervisors that the assessments at which Complainants now object were proper, just, and equitable, and such action of the said Board of Supervisors was ratified and confirmed by order of the State Tax Commission, as made and provided by statute. The said complainants did not appear and put in any objections whatever to the assessed valuations about which they now complain, and the defendants say that the matter has been fully, equitably, and justly adjudicated, and that the Complainants are estopped to be heard to complain at the results of such findings, and from which they had a right to appear on said notice and appeal. The proof of publication of such notice will be produced on the hearing of the cause.

Defendants deny that the said matters complained of fixed any unreasonable, arbitrary, or discriminatory as- [fol. 42] sessed valuation and they deny that it is in any way in violation of the due process of and equal protection

clause of the Fourteenth Amendment to the Constitution of the United States; and they deny as they already denied, that the construction of the road for which the proceeds of said bonds were used, has, in any way, interfered with the freight and passenger business of the said Complainants, the Memphis & Charleston Railway Company; and they deny that either passengers or freight have been diverted from the Memphis & Charleston Railway Company on account of the said improvements so as to reduce, hinder or diminish the receipts or revenue of the said complainant Railway Company; and deny that it has in any way been a detriment or an injury, but on the contrary, has been of material benefit to the said Railway Company.

The defendants deny that the taxes levied against the property of the Complainant Memphis & Charleston Railway Company have affected in a pecuniary way the Memphis & Charleston Railway Company at all, and the Defendants say the Memphis & Charleston Railway Company has no right to complain at all for the reason that whatever taxes the said Defendants proposed to assess and collect against their said property to liquidate said bonds and to meet said assessments complained of by the said Complainants, are indemnified by the Southern Railway Company under the provisional terms, and conditions of a certain contract entered into by and between the said Southern Railway Company and the said Memphis & Charleston Railway Company on the 3rd day of March, 1898, and which said agreement, with all reciprocal rights and indemnities, still obtains. A true copy of said contract is attached hereto as Exhibit "A" to this answer and asked to be taken and considered as a part of this answer; that the following provisions appearing in paragraph 12 of said contract, to-wit are:

[fol. 43] "Provided, that the said Memphis & Charleston Railway Company shall not be bound hereunder to make any payments in excess of its net receipts over and above the operating expenses of its railroad and appurtenances."

Defendants aver that the Memphis & Charleston Railway Company is already paying to the Southern Railway Company payments under the provisions of said contract to cover all of its net receipts for the year 1926, and that

under the provisions of said contract, it will have to pay the Southern Railway Company sums equal to its net receipts for and throughout the whole period of the life of the bonds here in question; so under the said provision the said Memphis & Charleston Railway Company has already contracted against the burden of said taxes, if a burden it should be considered, and hence is not, in any way, affected by the said taxes, especially in a pecuniary way.

Defendants aver that the Southern Railway Company is a railroad corporation created by and existing under the laws of the State of Virginia, and is amply solvent to take care of all the obligations assumed under the terms and conditions of said contract and all liabilities and indemnities it is under to the said Memphis & Charleston Railway Company, as aforesaid.

Now, to this end, the Defendants serve notice on the Complainant, the Memphis & Charleston Railway Company that they will on the first day of the regular December term, 1927, ask for a- order of the Court in the regular way against the complainant, the Memphis & Charleston Railway Company to produce its record to show what payments it made to the Southern Railway Company in the year 1926, and also what net receipts it received over and above operating expenses of its said railroad and appurtenances for the year 1926, to reveal to the Court upon what basis they arrive at the same, and under what subsidiary agreement, if any, the same is controlled, and the [fol. 44] order will require copies of any and all subsidiary agreements or addenda to the contract aforesaid.

The Complainants, the Memphis & Charleston Railway Company, will also take notice that an order will be requested of the Court in the regular way on the first day of the regular December 1927, term of the court, requiring the Complainant, the Memphis & Charleston Railway Company to present its books and records to show the rank and standing of the community of Iuka from a standpoint of revenue to the Railway Company, both as to passengers and as to freight as of *January* 1927, *particularly compared with said freight, as of* January 1, 1927, particularly compared with said freight and passenger receipts had by other stations east and west of said station of Iuka, Iuka to be considered with the pits and vicinity in and around Oldham in-

cluded. The said stations east and west to include Corinth on the west and Tuscumbia on the east, and to show the position the said Iuka and Oldham community has as a revenue bearing community in the whole line of the said Complainant company's operations.

Defendants admit that the said levy so objected to by complainants for said year amounts to substantially $450.00, and that sufficient property of complainants will be sold in manner provided by statute to satisfy said amount of taxes so levied unless the said defendant, Omer J. Bullen, sheriff and tax collector be enjoined.

And now, therefore, defendants, having answered as fully as they are advised it is necessary for them to answer, pray that the said injunction be dissolved and that they be allowed their damage, cost, and expenses, fully set out in the motion filed herewith with bill of particulars attached, and that they be allowed to go hence.

Ernest Ligon, J. A. Cunningham, W. W. Magruder,
Attorneys for Defendants.

[File endorsement omitted.]

[fol. 45] In Chancery Court of Tishomingo County

[Title omitted]

Amendment to Amended Answer—Filed Feb. 9, 1928

To the Honorable Chancery Court of said State and County:

Now comes the Defendants herein and beg leave of the Court to file the following amendments to the Amended Answer filed herein, to-wit:

By clarifying statements on page four of the Amended Answer, in this, to-wit:

That the defendants deny that the said Board of Supervisors and commissioners of the various said road districts had issued $100,000.00 and they deny that they had previously issued other bonds; and they deny that the sum total of $1,692,481 is the maximum assessed valuation of all the

real and personal property within the Lee Highway Road District; and they deny that any assessment has been made on the property of either the Lee Highway Road District or of the Oldham Road District that is in excess of the maximum allowed by law or that it is in any way irregular unfair or unjust.

The defendants, in order to make clear the averments sought to be made on page 14 of the Amended Answer, add the following words of averment between the close of the first and the beginning of the second paragraphs on page 14 of the said Amended Answer, to-wit:

They aver that the assessment for the year 1926 was made by the State Railroad Commission, as made and pro-[fol. 46] vided by statute; that on or before April 1, 1926, the said Complainant Railway Company filed with the State Tax Commission a complete, verified schedule, together with all the other matters and things required of it by Section 9369 of Hemingway's Code of 1927, including a description of the metes and bounds of the Oldham Road District setting out what parts of its roadbed and rights-of-way and other property were situated in the said Oldham Road District. A copy of said schedule cannot be filed herewith because the same is not available to the defendants, but the same is on record with the State Tax Commission, and reference is made to same. A copy of which will be produced on the hearing.

And the said Complainant Company had all due and proper notice to appear on or before the first Monday of July of said year and make any objection to assessments made against it, and the said Complainants did so appear, and the said demands were duly and properly considered, heard, and determined, and finally fixed, as made and provided; and the said Complainant Company had its day in court as to such assessments and failed and declined to take any action whatever to keep the said orders from becoming final. A copy of such said order is not available to the defendants at this time, but is accessible to the complainants, who have copies of the same, but a copy of said final order fixing said assessments will be exhibited at the hearing.

The defendants also aver that prior to making out its schedule, aforesaid, Complainant had its agents and em-

ployees to get up all the data, its agents and employees did get up all the data of and concerning the details of the organization of the Oldham Road District and the issuance of said bonds and had full information that said bonds were outstanding and were being offered on the market, and proceeded to make up its schedule and recognize said district [fol. 47] as a valid, binding, and subsisting taxing district and the said final order proposing to assess the properties including complainant's properties in said district, as provided by the terms and conditions of said bond, and notwithstanding all this notice and activity on its part, it made no objection and raised no protest whatever, but stood by and allowed the said road commissioners and the said Board of Supervisors, on behalf of said district, to put the said bonds out upon the market and to sell the same to purchasers in due course; and so we set the said line of conduct up as laches and as a complete defense to any rights the said Complainant Company might have had relative to the matters and things complained of in its original bill; and we allege that its said conduct, both here and that alleged in the Amended answer elsewhere, constitutes both laches and estoppel, of which the said Complainant ought not to be heard to complain of the said tax and other matfers complained of in their original bill and there sought to have permanently enjoined.

Ernest Ligon, J. A. Cunningham, W. W. Magruder,
Attorneys for Defendants.

[File endorsement omitted.]

[fol. 48] In Chancery Court of Tishomingo County

Minute Entry

Counsel for defendants, asked the Court to make and enter an order on the complainant, to produce the orders and maps and files peculiarly within their knowledge, set out and described in Complainant's amended answer and supplement thereto, under notice to the complainant.

IN CHANCERY COURT OF TISHOMINGO COUNTY

[Title omitted]

MOTION TO STRIKE PART OF AMENDED ANSWER—Filed Feb. 9, 1928

To the Honorable Chancery Court of said County and State:

Now comes the complainant, The Memphis & Charleston Railway Company by its attorneys and moves the court to strike from the amended answer of the defendants the last paragraph on page 14 beginning: "The defendants deny that the taxes levied against the property of the complain- [fol. 49] ant, Memphis & Charleston Railway Company affects in a pecuniary way the Memphis & Charleston Railway Company at all," etc.—and all of page 15 of the amended answer of the defendants; and all, but the last two strike from the last amended answer of the defendant, the paragraphs on page 16 of the defendant's amended answer; also exhibit "A" to the defendant's amended answer. To last paragraph on page 1, and all of pages two and three of said last amended answer filed in this cause.

And for grounds of said motion would show unto the court as follows:

First. That the Southern Railway Company is not a party to this suit and any agreement or arrangement made between the complainant and Southern Railway Company as to the manner and method of operating the said railroad in Mississippi is not pertinent and does not pertain to any facts connected with the issues in this litigation.

Second. The defendants in their answer had specially admitted that the property levied on, by the Oldham Road District for the year 1926, is the property of the Complainant, and having admitted this fact are now estopped from denying that the Memphis & Charleston Railroad Company will not have to pay the taxes levied on their property, and will not be affected in a pecuniary way should their property in said district be sold for said taxes.

Third. The Southern Railway is not a party to this suit and the defendants have no right to serve notice on them

to bring in their records showing the receipt they received over and above operating expenses for the year 1926; as the proper method to get this information would be by taking the deposition of the Southern Railway.

Fourth. The complainant should not be required by this [fol. 50] court to present its books and records to show the rank and standing of the community of Iuka from a standpoint of revenue to the railroad company, both as to passenger and freight as of January 1st, 1927, as compared with said freight and passenger receipts had by other stations east and west of said station of Iuka, as Iuka and the stations east and west thereof are not located in Oldham Road District; and whether or not the revenue of the station of Iuka is greater or less than the revenue of other stations east and west of Iuka is not pertinent to the issues in this cause or irrelevant and would not furnish any information to the defendant as to the constitutionality of Section 277 of the acts of 1920 of Mississippi.

Fifth. Because the State Railroad Commission has no jurisdiction whatsoever by Statute to change, modify, equalize, reduce, or amend assessments within special road districts against railroad companys and hence complainant is not, and cannot have been estopped by reason of anything done or omitted by either it or the State Railroad Commission from contesting the constitutionality of the laws contested in this case, or the assessment based thereon;

Sixth. The complainant had no legal right to appear before the State Tax Commission and file objection to a tax levy made by the Board of Supervisors of Tishomingo County against its property in the Oldham Road District.

Seventh. The last amendment is not in answer, or a denial of any of the allegations set up in the original bill; and since the answer is not a cross bill, and they ask for no affirmative relief said amendment as set out above should be stricken from the record.

Ely B. Mitchell, Counsel for Complainant.

[File endorsement omitted.]

[fol. 51] In Chancery Court of Tishomingo County

Order Sustaining Motion to Strike

By the Court:

The motion of the complainant to strike certain amendments and declarations in the answer, will be sustained, insofar as it is directed toward the proposition that the M. O. Railroad Company does not pay taxes, paid under contract by the Southern Railway Co.

[fol. 52] In Chancery Court of Tishomingo County

Statement of Evidence

Omer J. Bullen, being first duly sworn, being introduced by the Complainant, testified as follows:

Direct examination by Mr. Mitchell:

Q. Mr. Bullen, you are now Chancery Clerk of Tishomingo County, Mississippi?

A. Yes, sir.

Q. Custodian of the records of the Board of Supervisors of Tishomingo County?

A. Yes, sir.

Offers in Evidence

Mr. Mitchell: We want to introduce in evidence the Minutes of the Board of Supervisors of Tishomingo County, of January 1926, found in Minute Book 8, page 245, which shows the order of the Board on the petition for the organization of the District.

(Clerk here copy.)

In the Matter of the Issuance of Bonds by Oldham Separate Road District

Whereas, on January 4th, 1926, D. H. Curtis et al. filed a petition with the Board of Supervisors of Tishomingo County, Mississippi asking that certain territory herein-

after described be permitted to come under the provisions of Chapter 277, Laws of Mississippi 1920, and issue bonds in the sum of $6,500.00 for the purpose of constructing and maintaining one or more highways in the said hereinafter described territory, as provided for under said Chapter [fol. 53] 277, laws of Mississippi, 1920, and to create a road district known as Oldham Road District: said territory consisting and comprising the following territory, to-wit:

Beginning at the center of section 20, township 3, Range 11, thence south to the southern boundary line of the Southern right-of-way, thence in an easterly direction with the south line of the Southern Railroad right-of-way, to where the said line intersects the west line of section 33, township 3, Range 11, thence south with said line to the south west corner of section 33, township 3, range 11: thence east to the southeast corner of section 34 township 3, range 11: thence north to the northeast corner of section 27, township 3, range 11: thence west to the northwest corner of section 28 township 3, range 11, thence north 160 rods thence west 160 rods to center of section 20, township 3, range 11: thence west 160 rods to center of section 20, township 3, Range 11, to the point of beginning and: It appearing to the satisfaction of the Board that the said petition contained the names of more than 20% of the qualified electors of said territory, and is otherwise in compliance with the said Chapter 277 Laws of Mississippi 1920, and the said $6,500.00 does not exceed the amount of bonds which the Board of Suprevisors is authorized to issue against the said territory, and;

It further appearing to the Board that before the bonds of said territory can be issued that it is necessary that an election be ordered to be held on a day to be named by the Board of Supervisors, submitting the proposal to issue the $6,500.00 of bonds of the said territory to the qualified electors of said territory.

It is therefore ordered and adjudged by the Board of Supervisors that an election be held in North Iuka Voting [fol. 54] precinct, the said precinct being the regular voting precinct for the qualified electors of said district, on the 30th day of January 1926 described territory, and that the election commissioners of Tishomingo County, Mississippi, be authorized and directed to give notice of the said elec-

tion as required by law, by publication in a newspaper published in said county, and having a general circulation within said territory, proposing to issue the said bonds, for three consecutive weeks, which said election shall be held and conducted in the manner and according to the provisions of the chapter on Registration on and Election as found in Mississippi Code 1906 and amendments thereto, so far as applicable. The notice of said election to be in the following form, to-wit:

STATE OF MISSISSIPPI,
Tishomingo County:

To the qualified electors of the hereunder described territory:

A part of the First Supervisors District of said county, township, described as follows: Beginning at the center of section twenty, township 3, range 11, thence south to the southern boundary line of the Southern Railroad right-of-way, thence in an easterly direction with the south boundary line of said Southern Railroad right-of-way to where said line intersects the west line of section 33, township 3, range 11; thence south with said line to the southwest corner of said section 33, township 3, range 11; thence east to the southeast corner of section 34, township 3, range 11, thence north to the northeast corner of section 27, township 3, range 11, thence west to the northwest corner of section 28, township 3, range 11, *township 3, range 11* thence north 160 rods to the northeast corner of the southeast quarter of section 20, township 3, range 11, thence 160 rods to center [fol. 55] of section 20, township 3, range 11, a point of beginning. You are notified that by an order of the Board of Supervisors of said county, passed by them on the 4th day of January 1926, an election will be held at the North Iuka Voting Precinct on January 30th 1926 for the qualified electors of said territory to determine whether or not the bonds of the above described territory shall be issued in the sum of $6,500.00 for the purpose of constructing and maintaining one or more highways in said territory as provided for under the provisions of Chapter 277 laws of Mississippi 1920. This the 4th day of January 1926.

—— ——, Election Commissioners.

It is further ordered by the Board that the ballots used in said election shall contain on their face and be in the following form, to-wit:

Official Ballot, Special Election, January 30th, 1926

North Iuka Voting Precinct

$6,500.00 Bonds to Construct and Maintain Roads

For the issuance of Bonds: —.
Against the issuance of Bonds: —.

It is further ordered by the board that the election commissioners canvass the returns of said election and report the result thereof to the Board of Supervisors at its regular February 1926 meeting thereof. All of which is ordered by the Board this the 4th day of January 1926.
[fol. 56] We now offer in evidence the Minutes of the Board of Supervisors of February meeting, 1926, found in Minute Book 8, pages 254, 255, 256 and 257 as follows:

(Clerk here copy.)

Book 8, Page 254, Minutes of Board of Supervisors

Be it remembered that on this the 1st day of February 1926, the first Monday of said month, and the time and place for holding said court, there was begun and held in the court house in the town of Iuka, a court styled The Supervisors Court of Tishomingo County, Mississippi. The following members and officers being present: John M. Page, President, R. C. Grisham, 1st District; Elmer Locke member 2nd District, J. F. Oaks, member 3rd District, T. C. Pharr, and T. J. Storment, Clerk. Court was opened in due form of law by proclamation of the sheriff, and the following business was transacted, to-wit:

Order Granting Prayers of Petitioners for Public Road Running from Bear River Road at J. M. Franks, Running East to Public Road Leading from Old Union Church to Mingo, Miss.

Whereas, at the December, 1925, — the petition of J. M. Franks et al. praying for the laying out of a public road

beginning at Bear River Road at J. M. Franks, and running east across the field of J. M. Franks to Southwest corner of section 6, township 6, range 11, thence west along the south line of section 6, T. 6, R. 11 to Bear Creek; thence east to public road leading from Old Union Church to Mingo, Miss., was filed with the Board of Supervisors; and [fol. 57] Whereas, said petition was laid over until the February meeting and Whereas it now appearing to the Board of Supervisors that said petition was signed by more than 10 free holders and house holders interested in said road, and that all parties owning lands over, across and through which the said proposed road runs, and that the conveniences of the traveling public require the laying out of said proposed road, and there being no objections filed thereto.

It is therefore hereby ordered by the Board that the prayers of the petitioners be and the same is hereby granted, and J. F. Oaks, J. M. Page and T. C. Phar, members of this Board from districts other than the districts through which said road runs be and they are hereby appointed a committee to view out said contemplated road, and if found practicable mark same and report their actions in the premises in writing to this Board at the March 1926, meeting thereof.

Done by Order of the Board this the 1st day of February 1926.

The following accounts were allowed:

206.	Iuka Guaranty Bank, Int. on bonds due February 1st Burnsville Road Redempt. $902.25	$902 25
210.	Corinth Typewriter Exchange, Repairs to adding mach.	12 50
213.	J. E. Boothe, work 2nd Dist. roads	3 00
214.	R. W. Owens J. P. Lost, cost, & cost ex Officio services per list filed	53 65
215.	J. C. Jourdan, Jr., Refund excess paid on land at tax sale	8 28
218.	C. W. McKnight, Coal oil for jail per statement	2 15
219.	J. B. Scobey & Co., Supplies for Co. officers per statement filed: Chy. Clk., $36.80; Sher-ff, $7.50	44 30

220. A. F. Owens, Refund tax erroneously paid Paden School 1925 ..... 2.88

[fol. 58] 222. O. J. Bullen, services self and deputies Cir. Ct. Jan. term per approved statement filed 266 40

223. P. R. Adams, Ser. Cir. Clk. & Dep. Cir. Ct. Jan. term per approved statement filed .. 187 05

224. J. W. Powers, Sec. of State, Code 1906, for R. A. Cox 2 00

226. Bostrom-Brad Mfg. Co., 2 farm levels for Co. Agts. 40 00

227. W. P. Beard, Tax Refund Allen School for Taxes erroneously paid 2 50

228. J. B. Scobey & Co., Supplies for Chancery Clerk 1 85

Whereas on the 4th day of January 1926, D. H. Curtis, et al., filed with the Board of Supervisors of Tishomingo County, Mississippi a petition signed by more than 20% of the qualified electors of the proposed hereinafter described road district of Tishomingo County, Mississippi, described as follows: Beginning at the center 20, township 3, range 11, thence south to the southern boundary line of the Southern Railway right-of-way; thence in an easterly direction with the south line of the Southern Railroad right-of-way thence in an easterly direction with the south line of the Southern Railroad right-of-way to where said line intersects the west line of section 33, township 3, range 11; thence south with said line to the southwest corner of said section, twn. 3, range 11, thence east to the southeast corner of section 34, township 3, range 11; thence north to the northeast corner of Section 27, township 3, range 11, thence west to the northwest corner of section 28, township 3, range 11; thence north 160 rods to the northeast corner of the southeast quarter of section 20, township 3, range 11; thence west 160 rods to center of section 20, township 3, range 11, the point of beginning, praying that said territory be created into a separate road district and be permitted to come under the provisions of Chapter 277, Laws of Mis-
[fol. 59] sissippi, 1920, and that the Board of Supervisors order an election to be held on a day to be named, submitting the proposal to the qualified electors of the above

described territory of the issuance of $6,500.00 of bonds for the purpose of constructing and maintaining one or more highways therein, as in said act provided; and

Whereas at the January 1926 meeting of the Board of Supervisors of said county an order was passed ordering an election to be held at North Iuka Precinct said voting precinct being the voting place designated by law for the qualified electors of said district, submitting the question of the issuance of the $6,500.00 bonds of said territory to the qualified electors of said above described territory, and to determine whether said territory should come under the provisions of Chapter 277, Laws of Mississippi, 1920, and whether or not bonds of the said proposed road district should be issued in accordance with the provisions of said act, for the purpose of constructing improved roads in said district as provided for in said act; and

Whereas it was ordered that notice of the said election should be given according to the provisions of the Chapter on Registrations and Elections as found in the Mississippi code of 1906 and Laws amendatory thereto, and the election commissioners of Tishomingo County were directed forthwith to give notice of said—

Book 8, Page 255, Minutes of Board of Supervisors

election in accordance with the law and to hold the same according to the provisions of said chapter on Registrations and Elections and the said election commissioners canvass the returns of said election and certify the result thereof to the Board of Supervisors at its next regular meeting; and

[fol. 60] Whereas it now appears and is as adjudged that due and legal notice of said election was given by publication in the Vidette a newspaper published in said county and having a general circulation in said county in the issues of January 7th, January 14th, January 21st, and January 28th, 1926, which said notice is directed to be recorded herewith and is as follows, to-wit:

STATE OF MISSISSIPPI,
Tishomingo County:

To the Qualified Electors of the Hereinafter Described Territory:

A part of the First *Dupse*-visors district of said county described as follows: beginning at the center of section 20, township 3, range 11; thence south to the southern boundary of the Southern Railroad right-of-way; thence in an easterly direction with the south boundary line of said Southern Railroad right-of-way to where said line intersects the west line of sections 33, township 3, range 11, thence south with said line to the southwest corner of said section 33, township 3, range 11; thence east to the southeast corner of section 34, township 3, range 11; thence north to the northeast corner of section 27, township 3, range 11; thence west to the northwest corner of section 28, township 3, range 11; thence north 160 rods to the northeast corner of the southeast quarter of section 20, township 3, range 11; thence west 160 rods to the center of section 20, township 3, range 11; the point of beginning.

You are hereby notified that by an order of the Board of Supervisors of said county passed by them on the 4th day of January 1926, an election will be held at the North Iuka Voting Precinct on January 30th, 1926, for the qualified electors of said territory to determine whether or not [fol. 61] the bonds of the above described territory shall be issued in the sum of $6,500.00 for the purpose of constructing and maintaining one or more highways in said territory as provided for under the provisions of Chapter 277, Laws of Mississippi 1920. This the 4th day of January 1926.

——— ———.

And whereas it appears to the Board that on the 30th day of January 1926, the said election was duly and legally held and conducted at the North Iuka Voting Precinct, being the regular voting place for the qualified electors of said territory, according to the provisions of the chapter on Registration and Elections as found in the Mississippi Code of 1906 and laws amendatory thereto, as far as applicable; and

Whereas the ballots used in said election contained on their faces the following; and were in the following form to-wit:

Official Ballot, Special Election, January 30th, 1926

North Iuka Voting Precinct

$6,500.00 to Construct and Maintain Roads

For the issuance of Bonds: —.
Against the issuance of Bonds: —

as provided for under the provisions of Chapter 277, Laws of Mississippi 1920, which said ballots were furnished to the qualified electors offering to vote in said election; and [fol. 62] Whereas the returns of the said election were duly and legally made and canvassed by the election commissioners of Tishomingo County and the result thereof has been certified by the election commissioners of said county, to this board which certificate is on file with the Board, and is in words and figures as follows, to-wit:

State of Mississippi,
County of Tishomingo:

To the Honorable Board of Supervisors of Tishomingo County, Miss.:

We the undersigned election commissioners in and for said state and county hereby certify that the following is a true and correct number of votes polled at the Special Elections held at North Iuka Election precinct on the 30th day of January, 1926, for and against the bond issue of $6,500.00 as per returns received in our office, as follows, to-wit:

For the bond issue	19 votes
Against the Bond issue	3 votes

Witness our signature this the 1st day of February, 1926.
W. R. Nettles, Sam H. Allen, Mrs. E. N. Reid,
Election Commissioners.

And whereas the foregoing report of the election commissioners was duly filed with this board at its next regular meeting after said election, which was convened at the court house of Tishomingo County, Mississippi, on February 1, 1926, and it is hereby ordered and adjudged that said election was held at North Iuka Precinct on the 30th [fol. 63] day of January 1926 was carried in favor of the issuance of the bonds of said proposed separate road district; and

Whereas under the law it now appears to become the duty of this board to place said territory under the provisions of Chapter 277, Laws of Mississippi 1920, with reference to the construction and maintenance of public roads located therein and to appoint three commissioners who shall be qualified electors of said separate road district and real estate owners therein, to serve a term of four years from the time of their appointment, and until their successors are appointed by the Board; and

Whereas it appeared to the satisfaction of the Board that D. H. Curtis, W. H. Yarber, and Walter Thomas are qualified electors—

Book 8, Pages 255 & 266, Minutes of Board of Supervisors

of said district and real estate owners therein, and are duly qualified to act as such commissioners of said separate road district as provided by law.

It is therefore ordered and adjudged by the Board of Supervisors of Tishomingo County, Mississippi that the above described territory be and the same is hereby created, organized and placed under the provisions of Chapter 277, Laws of Mississippi, 1920, with reference to the construction and maintenance of a public road therein, and that D. H. Curtis, W. H. Yarber and Walter Thomas be and they are hereby appointed as road commissioners for said road district for a term of four years from this date or until their succesors are appointed by this Board and they are hereby invested with all the power pertaining to the said office as provided in said Chapter 277, Laws of Mississippi, 1920, for the management, supervision, con- [fol. 64] struction and maintenance of the public road built in said district under the provisions of said law, subject

to the approval of the Board of Supervisors, and for their services they shall be paid their actual expenses not exceeding $100 per annum out of the special fund created for the purpose of constructing and maintaining said road in said district upon an allowance to be made by the Board of Supervisors upon recommendation of the Commissioners; and

Whereas it appears to the Board that said territory organized into a separate road district should be designated by same name:

It is therefore ordered and adjudged by the Board of Supervisors that the said Separate Road District so created be designated and named "Oldham Road District of Tishomingo County, Mississippi."

All of which is ordered by the Board of Supervisors of Tishomingo County, Mississippi, this the 1st day of February, 1926, meeting of the Board, and all members of the Board being present and voting "Aye"; and

Whereas the road commissioners of the above described road district have filed a petition with the Board of Supervisors requesting that bonds be issued and sold; said petition being in the following form, to-wit:

STATE OF MISSISSIPPI,
Tishomingo:

To the Honorable Board of Supervisors of said County:

We the undersigned road highway commissioners of Oldham Road District of Tishomingo County, Mississippi, duly and legally appointed by your honorable body under the provisions of Chapter 277, Laws of Mississippi, 1920, [fol. 65] hereby petition your honorable body to issue the bonds of Oldham Road District of Tishomingo County, Mississippi in the sum of $6,500.00, the same being sold to the highest bidder for cash and the proceeds thereof to be used for the construction of improved ro*das* in said district as provided by law. The said amount of $6,500.00 is less that 15% of the assessed valuation of the taxable property in said road district.

This *is* the 1st day of February, 1926.

D. H. Curtis, W. H. Yarber, Walter Thomas, Highway Commissioners.

Decree Issuing $6,500.00 of Road Bonds for the Construction of Roads in Oldham Road District for Tishomingo County, Mississippi

Whereas on January 4th, 1926, the same being a day of the regular January meeting of the Board of Supervisors of Tishomingo County, Mississippi, the original petition was presented on the above cause signed by more than Twenty per centum of the qualified electors of the proposed Oldham Road District of Tishomingo County Mississippi asking that an order be entered permitting the said proposed separate road district to come under the provisions of Chapter 277, Laws of Mississippi, 1920, and asking that the Board order an election submitting the question of the issuance of the bonds to the qualified electors of the said territory to be organized into a separate road district and to issue the bonds of the said district in the sum of $6,500.00 as provided in said act; and

Whereas an order was entered in this cause on the 4th day of January 1926 ordering an election to be held on the 30th day of January 1926 to determine whether or not said territory should be allowed to come under the provisions of said chapter 277, Laws of Mississippi and [fol. 66] whether or not the bonds of the said district should be issued in the sum of $6,500.00 in accordance with the provisions of said Act for the purpose of constructing and maintaining public roads in said district as provided for in said district as provided for in said act; and

Whereas it was ordered that due notice of said election should be given according to the provisions of the chapter on Registrations and Elections as found in Mississippi Code of 1906 and Laws amendatory thereto, and the election commissioners of Tishomingo County should hold and conduct the election according to the provisions of said chapter on registrations and elections; and

Whereas, after due and legal notice, the said election was held on the 30th day of January 1926 and was participated in by the qualified electors of said district, when and where a majority of those so participating in said election voted for the issuance of $6,500.00 of bonds and the returns of said election were canvassed by the said election com-

missioners who certified the result of said election to this Board at the present meeting of the Board, which after examination of the same it was ordered that said election carried in favor of the issuance of bonds of the said proposed road district in the sum of $6,500.00, and it was further ordered that said district be created, organized and established and placed under the provisions of said chapter 277, Laws of Mississippi, 1920, with reference to the construction of public roads therein; and

Whereas the board has appointed three commissioners of said road district, to-wit, D. H. Curtis, W. H. Yarber, and Walter Thomas, who are qualified electors of said road district and real estate owners therein; and

[fol. 67] Whereas said commissioners have requested this Board by petition which is on file with the papers in this cause to issue the bonds of the Oldham Road District of Tishomingo County, Mississippi, in the sum of $6,500; and

Whereas the said commissioners have petitioned this Board in accordance with law and it appearing to the satisfaction of the Board that said bonds should be issued:

It is therefore ordered, adjudged, and decreed by the Board of Supervisors of Tishomingo County of Mississippi that the bonds of the Oldham Road District of Tishomingo County be made and the same are hereby issued in the sum of $6,500.00 for the purpose of constructing and maintaining one or more highways in said district.

It is further ordered by the Board that the said bonds be issued in the following manner to-wit: They shall be dated February 1st, 1926, and shall be numbered from 1 to 13, both inclusive, and shall be in the denomination of $500.00 each and shall bear interest at a rate not to exceed 6% per annum, payable semiannually, and shall mature as follows: Bonds Numbered from 1 to 5 both inclusive shall mature: 1 bond on February 1, 1927 and one bond on February 1st of each succeeding year thereafter for a period of four years; bonds numbered from 6 to 13 both inclusive shall mature: 1 bond on February 1st, 1932, and one bond on February 1st, of each succeeding year for a period of 7 years.

It is further ordered that said bonds shall be lithographed with suitable device to prevent counterfeiting and shall be in the denomination of $500.00 each, and shall be regis-

tered by the Clerk of this Board in a book kept for that purpose and shall be numbered from 1 to 13 consecutively and shall be signed by the President of this Board and countersigned by the Clerk of the Board, who shall impress the [fol. 68] seal of the county on each bond as it is issued, but the interest coupons attached to said bonds shall be lithographed with the fac-simile signatures of the President and the Clerk of this Board. Each bond shall be entitled "Road Bonds, Tishomingo County, Mississippi, Oldham Road District of Tishomingo County, Mississippi," and shall be in the following form to-wit:

UNITED STATES OF AMERICA,
State of Mississippi:

Tishomingo County Road Bond, Oldham Road District of Tishomingo County, Mississippi

No. —. $500.00

Know all men by these presents that Oldham Road District of Tishomingo County, Mississippi, is indebted to and for value received hereby promises to pay to Bearer five hundred dollars ($500.00) on the first day of February, 19—, with interest thereon at the rate of 6% per annum payable semi-annually on the first day of February and August each year on presentation and surrender of their respective coupons hereto annexed as they severally become due. Both principal and interest of this are payable in good and lawful money of the United States of America at ——, and the said Oldham Road District is hereby held and firmly bound and its faith and credit residue and property are hereby pledged for the principal and interest hereof at maturity. This bond is one of a series of like date, tenor and effect except as to the time of payment of an authorized issue of $6,500.00 issued by the Board of Supervisors of Tishomingo County for and on behalf of said Oldham Road District of Tishomingo County, Mississippi, for the pur- [fol. 69] pose of constructing and maintaining highways therein for the convenience of the traveling public in said Oldham Road District of Tishomingo County, Mississippi, under the authority of Chapter 277, Laws of Mississippi, 1920 and other laws of the state applicable thereto and

orders duly and regularly made and entered by the Board of Supervisors of said County.

This bond and the interest thereon together with the other bonds forming a part of this issue are payable out of a tax to be levied annually by the Board of Supervisors of Tishomingo County exclusively used in paying the interest of said bonds and providing a sinking fund for their redemption and the payment of the same as they fall due.

The said Board of Supervisors hereby covenants and agrees that it will levy annually until the payment of said bonds, both principal and interest as they respectively fall due a special tax on taxable property of said district sufficient for said purposes, and it is hereby certified and recited and declared that the debt incurred by the issuance of this bond was authorized by a majority of the electors of the said Oldham Road District of Tishomingo County Mississippi, who voted in an election called for that purpose duly and regularly held therein on the 30th day of January 1926, and that all acts, conditions and things required to be done have happened and have been performed in regular and due time and form as required by law, and the said indebtedness in evidencing this series of bonds does not exceed any statutory or constitutional limitations.

In witness whereof we, the undersigned, president and clerk of the Board of Supervisors of Tishomingo County, Mississippi, being duly authorized to execute this bond for and on behalf of said Oldham Road District of Tishomingo [fol. 70] County, Mississippi hereunto set our names and impress the seal of the said county hereon as of the last day of February, 1926.

—— ——, President of the Board of Supervisors of Tishomingo County, Mississippi.

Countersigned: —— ——, Clerk of the Board of Supervisors of Tishomingo County, Miss.

It is further ordered by the Board that said bonds shall contain on their faces such other stipulations as the purchaser may desire, provided the same be consistent with the above recitals in this bond.

It is further ordered that the interest coupons annexed to said bonds shall be in substantially the following form, to-wit:

Interest Coupons

No. —. $15.00

On the 1st day of February (or August), 192-, the Oldham Road District of Tishomingo County, Mississippi, will pay to the Bearer Fifteen Dollars ($15.00) good and lawful money of the United States of America at ——, being six months' interest due on its road bonds dated February 1, 1926.

—— ——, President of the Board of Supervisors of Tishomingo County, Mississippi.

Countersigned: —— ——, Clerk of the Board of Supervisors of Tishomingo County, Mississippi.

[fol. 71] It is further ordered that such coupons shall also contain on their face such other stipulations as the purchaser may desire provided the same be consistent with the law and consistent with the above recitals.

All of which is ordered by the Board of Supervisors of Tishomingo County, Mississippi, this the 1st day of February, 1926.

Ordered that the Board do now adjourn until tomorrow morning, February 2nd, 1926, at 8:00 o'clock A. M.

John M. Page, President.

We next offer the Minutes of the Board of Supervisors of Tishomingo County as found in Minute Book 8, page 264, with reference to the bid for the sale of bonds of Oldham Road District, as follows:

(Clerk here copy.)

[fol. 72] Book 8, Page 264, Reference Bid on Bonds of Oldham Road District, Minutes of Board of Supervisors

To the Honorable Board of Supervisors of Tishomingo County, Mississippi:

Gentlemen: For the $6,500.00 bonds of the Oldham Road District of Tishomingo County, Mississippi, to be dated February 1, 1926, bearing interest at 6% per annum, payable semi-annually, principal and interest to be payable at the

legally selected county depository for the public funds of Tishomingo County, Mississippi, at Iuka, Mississippi, said bonds to be in denomination of $500.00 each and to mature as ordered by the Board of Supervisors, without option of prior payment, we will pay to you par and accrued interest from date of bonds to delivery of same plus a premium of $50.00 provided you promptly furnish us with a certified transcript of all proceedings had prior to and incident to the issuance of said bonds, for which we will pay the expense, satisfactorily evidencing to Charles & Rutherford attorneys of St. Louis, Mo., the legality of the issue and sale to us of said bonds in all respects, and you agree, and you agree to take such further action and have such further order passed as said attorneys may require to establish the legality of said issue and sale. This offer is for immediate acceptance and prompt delivery of bonds. As evidence of our good faith we hand you herewith certified check in the sum of $250.00 to be held by you uncashed pending our compliance with the terms and conditions of this bid and to apply in part payment for said bonds when delivered to us; otherwise to be forfeited by us as full liquidated damages in case of our failure to comply with the terms of the above agreement, if for any reason said attorney's fail to approve [fol. 73] this issue then said check is to be returned to us.

Iuka Guaranty Bank, by L. T. Gaines, V. P.

Accepted to and agreed to by resolution duly passed by the Board of Supervisors of said Tishomingo County, Mississippi, this the 4th day of February, 1926.

John M. Page, President of the Board of Supervisors.

Attest: T. J. Storment, Clerk.

And whereas it now appears that said bid of the Iuka Guaranty Bank, as set out here in full, was the last, best and highest bid, and that said bonds should be sold to the said Iuka Guaranty Bank at and for said price,

It is therefore ordered by the Board that said bonds be and the same are hereby sold to the Iuka Guaranty Bank at and for the amount of their bid as hereinafter set out and according to the terms and conditions embodied in said bid.

Ordered by the Board this the 4th day of February, 1926.

Ordered that the Board do now adjourn until court in course this the 4th day of February, 1926.

John M. Page, President.

[fol. 74] We next offer in evidence the order of the Board of Supervisors of Tishomingo County, with reference to the place of paying the bonds of Oldham Road District, as found in minute book 8, page 288, as follows:

(Clerk here copy.)

Minute Book 8, Page 288, Board of Supervisors, Reference Bid Bonds of Oldham Road District

In the Matter of the Issuance of $6,500.00 Bonds of the Oldham Road District of Tishomingo County, Mississippi

Whereas heretofore the bonds of the Oldham Road District of Tishomingo County, Mississippi has been issued in the sum of $6,500.00 by the Board of Supervisors of said county, and; whereas the Board of Supervisors in fixing the place of the payment of the principal and interest of said bonds when due, passed an order fixing the place of payment at "The legally selected and commissioned Depository of county funds of Tishomingo County, Mississippi" or similar words, and whereas the Iuka Guaranty Bank, the purchaser of said bonds are desirous of having the place of payment of said bonds more definitely fixed by order of said board, and are desirous of having the place of payment fixed at "Iuka Guaranty Bank, Iuka, Miss.:" and

Whereas it appears to the Board that the said change should be made and that the bonds and interest thereon should be made payable at the "Iuka Guaranty Bank, Iuka, Mississippi,"

[fol. 75] It is therefore ordered and adjudged by the Board of Supervisors of Tishomingo County, Mississippi, that the bond, both principal and interest of the Oldham Road District of Tishomingo County, Mississippi shall be payable at the Iuka Guaranty Bank of Iuka, Missisippi.

Ordered and adjudged in open court this the 3rd day of May 1926.

Counsel for defendants objected to the Minute just offered, for the reason it is impertinent and immaterial, and we object to the offering of the Minutes of the Board of Supervisors on question of laying out of the road, because th-ows no light whatever on the validation of the issuance of the bonds in this litigation.

Court reserved ruling.

We next offer the Minutes of the Board of Supervisors with reference to the laying out of the road or roads in Oldham Road District, as found on page 304, of Minute Book 8, as follows:

(Clerk here copy.)

Same objection was made to the offering of the above minute as above and for the same reasons.

(Court will hear under same reserved ruling.)

(Clerk here copy.)

[fol. 76] Book 8, Page 304, Minutes of Board of Supervisors, Reference Laying Out Road District

STATE OF MISSISSIPPI,
Tishomingo County:

In the Matter of Laying Out a Public Road in the Oldham Road District of Tishomingo County, Mississippi, Petitioned for by the Commissioners and Others of said Road District

Whereas on the 7th day of June 1926 a petition signed by the Road Commissioners of the Oldham Road District and others interested in said road was filed with the Board of Supervisors of said county asking that a public road be laid out in said road district commencing at a point on the Iuka and Free Bridge about 500 yards east of the Residence of L. T. Lominick and terminating at a point on the Lee Highway at or near Oldham, a distance of 3 or 4 miles. The general course of said road being through the lands of Mrs. L. T. Lominick, Mrs. Atha Nix, G. A. Hazard, Henry Minor, W. H. Yarber, J. W. Thomas, Walter Thomas, D. H. Curtis, Odie Yarber, Memphis Stone & Gravel Co., P. H. Watkins, A. F. Whitehurst; and

Whereas it appearing to the Board that all the owners of the lands over and across which said proposed road runs have signed this petition waiving all claims for damages except Mrs. Atha Nix, Mrs. L. T. Lominick, G. A. Hazard & Memphis & Stone & Gravel Co., all of whom have been given five days notice prior to the filing of this petition; and whereas it further appearing to the Board that the said proposed road is to be improved by funds derived from sale of bonds and that the said commissioners signing [fol. 77] the said petition are duly qualified and acting Road Commissioners of said district, and that the public convenience require the laying out of said road,

It is therefore ordered by the Board that the prayers of the petitioners be and the same *is* hereby granted and Elmer Locke and T. C. Pharr, members of this Board from Districts other than the districts through — said road runs be and they are hereby appointed a committee to view said proposed road and if found practicable to make same and report the result of their action in writing to this Board, all of which is ordered by the Board this the 9th day of June 1926.

We next offer the Minutes of the Board of Supervisors of Tishomingo County with reference to the removal of two of the Commissioners of said Road District, as found on page 305 of Minute Book 8.

Same objection was made and for same reasons.
(Court let go in under same reserved ruling.)

(Clerk will here copy.)

[fol. 78] We next offer the Minutes of the Board of Supervisors of Tishomingo County, appointing two other road commissioners of Oldham Road District, as found on page 305 of Minute Book 8, as follows:

Same objection made and for same reasons.
Court heard under same reserved ruling.

(Clerk here copy.)

We next offer the report of the Commissioners of Oldham Road District to the Board of Supervisors and the Minute of said Board on said petition, as found on page 322 of Minute Book 8, as follows:

(Clerk here copy.)

Same ob*h*ection and for same reason as above.
Court made same reserved ruling.

[fol. 79] Book 8, Page 305, Minutes of Board of Supervisors

In the Matter of Removing D. H. *D*urtis and Walter *T*homas as Road Commissioners of the Oldham Road District

Came on to be heard and was heard on motion of R. C. Grisham duly seconded by J. F. Oaks the matter of the removal of D. H. Curtis and Walter Thomas as Road Commissioners of the Oldham Road District and upon a vote being taken the motion was declared carried.

It is therefore hereby ordered that D. H. Curtis and Walter Thomas be, and they are hereby, removed from the office of Road Commissioners of the Oldham Road District of Tishomingo County, Mississippi, effective this date. All of which is ordered by the Board this the 9th day of June 1926.

In the Matter of Appointment of J. T. Smith and Lang Thompson to Serve as Road Commissioners in the Oldham Road District of Tishomingo County

Came on to be heard and was heard on the motion of R. C. Grisham seconded by Elmer Locke, the matter of appointing J. T. Smith and Lang Thompson to serve as road commissioners in and for the Oldham Road District of Tishomingo County, Mississippi; and

It appearing to the Board that the said J. T. Smith and Lang Thompson are qualified electors and landowners in the territory of the Oldham Road District and are suitable persons for such trust,

It is therefore ordered that J. T. Smith and Lang [fol. 80] Thompson are hereby appointed to serve as Road Commissioners in and for the Oldham Road District for a period of four years from date hereof and until their successors are appointed upon their taking the oath of office as prescribed by law. All of which is done by order of the Board this the 9th day of June 1926.

Book 8, Page 322, Minutes of Board of Supervisors

STATE OF MISSISSIPPI,
Tishomingo County:

To the Honorable Board of Supervisors of said County:

We, the undersigned Highway Commissioners of Oldham Road District of Tishomingo County, Mississippi, would show that the said Oldham Road District has been organized and incorporated under and by virtue of the provisions of Chapter 277 of Laws of Mississippi, 1920, and that said road district has issued and sold its bonds in the sum of $5,500.00 for the purpose of constructing roads in said district as authorized by said; The commissioners would further show that by and with the consent of the Board of Supervisors that are authorized by Chapter 280 of the laws of Mississippi, 1920, to construct and maintain roads and highways adopted under the provisions of said act and to that end to purchase material and purchase or lease any equipment, appliances or machinery and pay for any grading and hauling necessary for the construction of said roads or highways and to employ and hire [fol. 81] such labor as they deem necessary. The commissioners would further show that they deem it to be to the best interest of said district to construct and maintain the roads adopted by the commissioners and the Board of Supervisors in said District in the manner authorized and provided by said Chapter 280 Laws of Mississippi 1920, and hereby petition your Honorable body to make and enter an order on your minutes authorizing the said commissioners to proceed with the construction of such road in said district as may be adopted by the commissioners by the Board of Supervisors to receive the benefits of the bond issue in the manner and as authorized by said chapter 280 Laws of Miss., 1920, and to that end to permit the commissioners to purchase material and purchase and lease any equipment, appliances or machinery and pay for any grading and hauling necessary for the construction of such roads or highways and to employ such labor as they deem necessary for and the commissioners be authorized to purchase equipment, materials, supplies and appliances for the construction and maintanances of such roads or highways without competitive bids where the amount of such

purchase does not exceed Five Hundred dollars as provided by the provisions of Chapter 280 Laws of Mississippi, 1920.

This the 15th day of July 1926.

J. T. Smith, W. F. Yarber, Lang C. Thompson, Commissioners.

Ordered that the Board do now adjourn until tomorrow morning, Saturday, July 17th, 1926.

John M. Page, President.

[fol. 82] And now comes the defendants for the purpose of clarifying said objection, and moves that the Court exclude any and all testimony, such as all Minutes, which occurred after the issuance and sale of the bonds and the disposition of the funds, which is a matter of liability on the part of the Board of Supervisors and the Road Commissioners, and is not in any way connected with the validation of the bonds, the issuance or the sale thereof.

(Court reserved ruling.)

Mr. Mitchell:

Q. Now Mr. Bullen, I will ask you if there are any other Minutes other than those I have named in here, on the organization of the Oldham Road District?

A. I am not prepared to say, because this all took place before I came in; I haven't gone over the Minutes since I came in the office, except in the last two weeks.

Q. I will ask you to prepare yourself to answer that question later.

By the Court: These Minutes so offered, do they include all the Minutes of the Board touching the particular bond issue at stake in this law suit?

Mr. Mitchell: We ask that the introduction here, if any has not been included, all the Minutes with reference to the organization of the Road District, from the filing of the [fol. 83] petition on page 245 of the Minutes to 322 of Minute Book 8, and if by oversight, any of the orders with reference to the Oldham Road District have been omitted, they be considered in evidence in this case.

Defendants objected, making the same objection as outlined heretofore, and under the same reserved ruling by the Court.

Q. Mr. Bullen, what book is that you have in hand?

A. The Sheriff's charge book.

Q. Were you Sheriff of Tishomingo County during the year 1926?

A. Yes, sir.

Q. And custodian of the records at that time?

A. Yes, sir; this record is in the Chancery Clerk's office where the Sheriff is charged up realty in the County where we collect from.

Q. And you are now Chancery Clerk?

A. Yes, sir.

Q. I will ask you what is the assessed valuation of Tishomingo County for the year 1926?

A. $4,196,493.00.

Q. What was the assessed valuation of the First Supervisors' District of Tishomingo County in 1926?

A. Now this record here shows $1,249,516. I went through and added those totals and found a small discrepancy, but that is approximately what it is.

Q. Just a small amount you say?

A. Yes, sir.

Q. I wish you would tell what is the assessed valuation of the property in Lee Highway road district during the year 1926.

Defendants object to that, because incompetent and irrelevant.

Court reserved ruling.

[fol. 84] A. $1,692,481.00.

Q. What was the assessed valuation of the property in Oldham Road District in Tishomingo County for the year 1926?

A. $181,446.00.

Q. What is the assessed valuation of the property in Snowdown School District for the year 1926?

Defendants interpose the same objection for the reason that counsel has stated that the purpose of this is to show that it is over a 15 per cent debt, while the Supreme Court

of the State of Mississippi has specially held that there may be as much overlapping of Districts as necessary.

Court makes same reserved ruling.

A. $251,244.00.

Q. Mr. Bullen, I will ask you whether or not the record you have shows that Tishomingo County, as a whole, issued $300,000 of road bonds of date of September 1st, 1924?

A. This record does not; but I have one that does show it.

Q. Is that correct?

A. Yes, sir; $300,000; that includes the whole county.

Defendants object to the introduction of that, for the same reason, immaterial, etc.

Court makes same reserved ruling.

All this testimony tending to show any bond issue over 15 per cent of their valuation, touching other districts, goes in under objection by the defendants, and under reserved ruling by the Court.

[fol. 85] Q. Mr. Bullen, look at your record and see whether or not the First Supervisors District, issued the $35,000 worth of bonds on December 15th, 1911.

Defendants objected to that on the further ground that not the amount of bonds that was issued, but those bonds being payable serially, the amount of bonds outstanding on that theory of the case, on the date of the issuance of the Oldham Road District.

Court makes same reserved ruling.

A. $35,000 issued December 15th, 1911.

Q. I will ask you to state if your record shows the same Supervisor's District issued road bonds to the amount of $79,000 on October 1st, 1919?

A. Registration of $79,000, First Supervisors District October 1st, 1919.

Q. State what your record shows with reference to the issuance of $9,000 worth of bonds on October 1st, 1919 of the First Supervisors District of Tishomingo County?

A. Registration, $9,000; date of issuance, 10/1/19, road bonds 1st Supervisors district.

Q. All the bonds I have asked you about, road bonds?

A. Yes, sir; except Snowdown School bonds.

Q. What does your record show as to the amount of bonds issued by the Lee Highway Road District of date, November 1st, 1922?

A. $100,000 road bonds Lee Highway, date Nov. 1st, 1922.

Q. What does your record show as to the amount of road bonds issued by the Oldham Road District on the 1st day of February 1926?

[fol. 86] A. $6500.00 bonds of Oldham Road District, Feb. 1st, 1926, date of issuance.

Q. What does your record show as to the amount of bonds issued by Snowdown School District of date, July 2nd, 1923?

A. Registration of bonds, $3500.00, Snowdown Consolidated School District, date of issue, July 2 23.

Mr. Mitchell: We offer the parts of the record he is testifying from in evidence, that shows the issuing of $300,000 bonds for Tishomingo County:

$30,000 worth of bonds of the First Supervisors District.
$79,000 worth of bonds of 1st Supervisors District.
$9,000 worth of bonds of 1st Supervisors District.
$100,000 worth of bonds of Lee Highway District.
$6,500 worth of bonds of Oldham Road District.
$3,500 worth of bonds of Snowdown School District.

Defendants ask to have all of the evidence relative to the issuance of bonds in various and sundry tax Districts and political sub-divisions heretofore offered, excluded for the reason that they are incompetent, immaterial and irrelevant, and for the further specific reason, that it is not shown that the various and sundry political subdivisions and tax districts included here, are homogeneous in area to the Oldham Road District, tax district, whose taxing capacity is here under consideration, and for the further reason that Tishomingo County is estopped on collateral attach, as in the instant case, from alleging against bonds that have been sold in due course of business; that the issuance of those bonds was in excess of Statutory limitations.

[fol. 87] Court reserved ruling.

Q. Mr. Bullen, I hand you a piece of paper that purports to be a map of Tishomingo County. Is that a fair representation of Tishomingo County?

A. I think so.

Q. Does that map show the First Supervisors District as marked off in pink, or light red?

A. I think so; just a small comparison with the map filed in my office. I could be more exact about it; I am sure it is. In my opinion it is correct.

Q. Does that map show the boundaries of Burnsville Road District, which is a part of the Lee Highway Road District of Tishomingo County?

A. Yes, sir.

Q. And that is indicated by what color on this map?

A. Dark red or brown.

Q. I will ask you whether or not Oldham Road District on this map, appears to be in the 1st Supervisors District?

A. Yes, sir.

Q. Is it within the boundaries of the Lee Highway Road District?

A. Yes, sir.

Q. How is it indicated, as to its boundaries and the land included therein, on this map?

A. Colored solid orange.

Q. Will you file this as an Exhibit to your testimony?

A. Yes, sir.

Same was here marked by the Stenographer as Exhibit [fol. 88] "A" and same is hereto attached as a part of this record.

We want to exhibit to Mr. Bullen's testimony, the Minutes of the Board of Supervisors of Tishomingo County, which have been heretofore referred to and copied in this record.

We want to offer as an exhibit, what is known as the "Sheriff's charge book, showing valuation of the various Districts referred to in his testimony.

Same was here marked by the Stenographer as Exhibit "B".

Also the amount of the bonds issued by the various Taxing districts, as shown in the Registration of Bonds.

Same was here made and marked as Exhibit "C".

We also introduce map of Tishomingo County, which is here marked Exhibit "D".

Q. What is the assessed value of the real property, as of date 1926, February 1st, 1926, of Oldham Road District?
A. $26,730.00.
Q. What is its personal, at the same time of the same district?
A. $35,070.00.
Q. What is the assessed value of the Memphis & Charleston Railway Co., in the same district and at the same time?
A. $113,200.00.
Q. The Southeastern Express Co., in the same district and at the same time?
[fol. 89] A. $1,500.00.
Q. Western Union Telegraph Co?
A. $1556.00.
Q. Cumberland Telephone and Telegraph Co?
A. $1095.00.
Q. Pullman Co?
A. $1219.00.
Q. American Telephone & Telegraph Co?
A. $1600.00.
Q. What is the total of all taxable property of Oldham Road District as of February 1st, 1926?
A. $181,446.00.

Counsel for defendants object to all testimony with reference to specific assessment against these other corporations on the ground that Memphis & Charleston Railway Co., is not concerned with any assessment against other corporations, only as to assessment of its own property in Oldham Road District.

By the Court: This will be admissible only to show total assessment.
Excepted to.

Q. I hand you here, a tax levy of the Board of Supervisors of Tishomingo County, of November Term, 1926,— Is that a true, correct list, tax levy as shown by the Minutes of the Board of Supervisors, November Term, 1926?
A. Yes, sir.

(We here offer this as Exhibit to this witness' testimony, and same was here identified and marked by the Stenog-
[fol. 90] rapher as Exhibit "E".)

(The original, or rather printed form, is hereto attached as a part of this record.)

Q. Mr. Bullen, I hand you a sheet of paper here, which shows the assessment of February 1926, against the Memphis & Charleston Railway Co., in Tishomingo County, including the Oldham Road District. Is this sheet a true and correct copy of the original furnished you by the State Tax Commission?

A. Yes, sir.

We here offer this as Exhibit to Mr. Bullen's testimony, and same was marked and identified by the Stenographer as Exhibit "F," copy of which will be hereto attached.

Q. Have you got the personal assessment book up here, with reference to the Oldham Road District and the realty for the year 1926?

A. No, sir; I don't have it up here.

Q. Will you please get these and lets introduce it?

(Witness goes to office to get same, and produces same in Court.)

Q. I wish you would turn to the personalty of Oldham Road District of 1926. What is your first man's name and how much is his personal property valued at by your personal tax roll of 1926 of Tishomingo County?

[fol. 91] A. D. H. Atkins, valuation, $100,000——

Defendants object to this testimony on the ground that individual taxation against private parties has nothing to do with this litigation.

By the Court: There is an averment in the bill that the total paid by the individuals is so much and defendant's deny it, so the Court will hear this under reserved ruling for the present.

Q. Allen Gravel Company?

A. $15,600.

Q. Just give them all:

A. —

E. D. Borden	$60 00
W. J. Borden	50 00
J. B. Bray	60 00
F. C. Chester	390 00
D. H. Curtis	200 00
Drew Chalmers	170 00
O. E. Curtain	270 00
Mac Hubbard	80 00
J. A. "	40 00
I. L. Johnson	500 00
S. J. James	180 00
L. S. Johnson	350 00
Memphis Stone & Gravel Co.	$15,000 00
R. L. McKinney	250 00
Owen McKinney	150 00
A. M. Nix	120 00
J. F. Morris	30 00
Will Ramsey	150 00
J. T. Smith	140 00
L. C. Thompson	150 00
[fol. 92] P. H. Watkins	440 00
W. H. Yarber	250 00
J. L. Taylor	120 00

Q. Now is that all of the personalty of Oldham Road District as assessed by your record here in 1926?

A. Yes, sir.

Q. I hand you Land Book, and ask you to turn to Land Assessment Book of Tishomingo County of 1926, and ask you to turn to the assessment against Oldham Road District?

Mr. Mitchell: We offer in evidence lines 1-2 and 3, of page 170; lines 12-39, inclusive, of page 171; lines 1-8 and 22 to 30 of page 172; lines 1-6, both inclusive, of page 173.

Q. I will ask you if that is all the real assessment against the property in Oldham District as shown by your record for the year 1926?

A. Yes, sir.

No cross-examination for the present.

(Witness dismissed.)

[fol. 93] E. S. Davis, being first duly sworn, testified as follows on behalf of the complainant.

Direct examination by Mr. Hyde:

Q. Name E. S. Davis?
A. Yes, sir.
Q. What is your age?
A. Forty.
Q. Profession?
A. Civil Engineer.
Q. Where do you reside?
A. Knoxville, Tennessee.
Q. What connection have you with complainant, Memphis & Charleston Railway Co.?
A. Resident Engineer.
Q. How long have you held that position?
A. Three years.
Q. How long you been employed in Railroad engineering?
A. About 17 years.
Q. Mr. Davis, I will ask you to state whether or not you made a plat and map of the Oldham Road District?
A. I did, yes, sir.
Q. When did you do that?
A. That was about January 21st, 1928.
Q. I will ask you to point to the map, which is in front of you hanging on the wall, and get you to state whether or not that is the map which you made of the Oldham Road District?
A. Yes, sir, that is the map, plat, of the metes and bounds of the Oldham Road District.

[fol. 94] We ask that this please be filed as Exhibit "A" to Mr. Davis' testimony.

(Same was here marked as Exhibit "A," the original of which goes up with this record.)

Q. Now, Mr. Davis, the boundaries of the Oldham Road District, are indicated on that map, how?
A. The boundaries of the Oldham Road District are shown by yellow crayon outline.
Q. You plated those boundaries from the description incorporated in the bill and admitted in the answer?
A. Yes, sir.

Q. And they are substantially correct?

A. Yes, sir.

Q. State how, as indicated on that map, the road constructed by the Oldham Road District. How did you get the data and put there on the map?

A. By making a stadia magnetic survey.

Q. How were they indicated in color?

A. Indicated in red on the map.

Q. What does the yellow line on the Southerly boundary of the map indicate?

A. Yellow line indicates Lee Highway through District.

Q. What does the green line along the Northerly portion of the map indicate?

A. Indicates the road known as the Free Bridge Road.

Q. State whether or not those lines in red, which purport to indicate the location of Oldham Road District situation are located on the ground according to your survey?

[fol. 95] A. Yes, sir.

Q. Approximately, what length is the main Oldham Road from Oldham, running northwesterly to its connection with the Free Bridge Road?

A. About 14,170 feet.

Q. In miles what would that amount to?

A. About 2¾ miles.

Q. What is the approximate length of the connecting, road running to the gravel siding?

A. That is to Allen Gravel Co. That is about ¾th of a mile 4,690 feet.

Q. State if you please, what is the length in miles, of the main track of the Memphis & Charleston Railway Co., through the Oldham Road District?

A. It is 2.88 miles.

Q. What is the approximate mileage of the side track of the Memphis & Charleston Railway Co., in the District—just refresh your memory and give us the approximate figures?

A. The tax returns, as of February 1st, 1926, indicate 2.69 miles.

Q. From your calculations Mr. Davis, state what is the total acreage of the Oldham Road District?

A. I calculated approximately 2,950 acres within the Oldham Road District.

Q. Where we allege in the bill the total acreage is 3,020 acres, that figure is erroneous to that extent I believe? Your calculation is 2,950?

A. Yes, sir; that is the approximate acreage.

Q. What is your calculation of the Railroad lands; first the right of way included in the Oldham Road District?

A. My calculation for the main track of right of way, [fol. 96] we have 51.83 acres.

Q. What other lands are owned and assessed to the Memphis & Charleston Railway Co., in Oldham Road District for 1926?

A. There is a triangle shaped lot which lies on the North side of the Railway Company's main track right of way and it is in the S. E. ¼ of Sec. 34. That is returned to Railroad Commission or State Tax Commission, as 5.96 acres, which is correct.

Q. What then do you calculate the total acreage of the Railway Company in the District?

A. The total would be 57.79 or about the 58 acres.

Q. What per cent of the total acreage of the Oldham Road District is the Railroad assessed as shown therein?

A. The ratio of the acreage owned by the Railway Company, to the total area, is 1.9 per cent, or about 2 per cent.

Defendants object to the offering of that evidence as to the proportionate area.

Court reserved ruling.

Q. According to the admitted descriptions of the territory embraces in the Oldham Road District, what sections of land are included therein, Mr. Davis?

A. Sections 27, 28, 33 and 34.

Q. Those sections are shown on your map?

A. Yes, sir.

Q. Also what other sections are shown?

A. S. E. ¼ of 20, and part of the N. E. ¼ of 29, and part of the S. E. ¼ of 29.

Q. Referring to the map, your Exhibit "A," Mr. Davis, state whether or not, any of the roads constructed by the Oldham Road District lying within the boundaries of that [fol. 97] part of Sections 20 and 29, which are included in the *v*oundaries of the District?

A. They do not.

Defendants object on the ground you would have to build a road on every section or every part of a section.

Court reserved ruling.

Q. Mr. Davis, I show you a description of the Oldham Road District, and will get you to state where the Southern Boundary of the road District is fixed, whether it traverses through Section 29?

A. The Southern boundary of the Oldham Road District through Section 29, is contiguous with the Southerly boundary line of the Railway Company's right of way.

Q. Does that or not have the effect of including the Railroad right of way through that part of 29 within the Oldham Road District?

A. That includes the main track of the Railway Company, and excludes that portion of Section 29 South of the Railroad.

Q. Have you prepared any figures showing how much additional main track mileage and right of way is included within the Oldham Road District, by reason of the inclusion in the District of those parts of Section 29?

A. By including those parts of Section 29, an additional length of main track or 4.247 feet was added to the Railway Company's mileage.

Q. Do you know what percentage of the total mileage was in the district, that represents?

A. I haven't got it figured that way, but 4.247 feet increases the mileage through sections 33 and 34 about 35.69%.

Q. State in general, your observations with regard to [fol: 98] the kind of lands included in those parts of Section 29, Mr. Davis, with reference to the population living thereon?

A. Well, my observation of lands along the Railroad in Section 29; I did not go back through the quarter section, but seemed to be heavily timbered and rather swampy land.

Q. From your observation and surveying of the road where the Oldham Road District is, as a whole is it thickly or thinly populated?

A. Very thinly populated.

Q. State whether or not there are station facilities on the railroad at any place within the Oldham Road District?

A. There are no station facilities or public loading tracks within the Oldham Road District, either at Oldham, Miss., or Gravel Siding. These are simply designated for shipping points for car load freight.

Q. State whether or not the construction of the Oldham Road which you show in red on your blue print, Exhibit "A," tap any undeveloped revenue producing territory for the railroad?

A. They do not tap any new previously undeveloped territory; in fact there has always been, or has been for some time, roads along the route of the new road, indicated in red on the print.

Q. State whether or not the purpose in general was for the improving of existing neighborhood roads?

A. That was the idea I gathered from observation; the roads were old wagon roads, widened and graded for automobile travel for the residents in that vicinity.

Q. What was the lateral distance, approximately, through the Oldham Road District and the Lee Highway and Free Bridge road?

A. Averages approximately 2 miles.

Q. State whether or not those roads which have been [fol. 99] referred to, that is, the Lee Highway and Free Bridge Road, are existing hard surface highways?

A. The Lee Highway is often confused as hard surface highway, by a surface of gravel and through highway. The Free Bridge Road has no surface, merely what would be considered a dirt road; however it is sand and gravel road and open for travel all the time.

Q. Where do those two roads lead to going Westerly?

A. The Lee Highway extends all through Alabama and Mississippi and easterly, the large cities of the east, and Sheffield and Tuscumbia, Alabama.

Q. State where the Lee Highway goes first, immediately running to the West?

A. Iuka.

Q. On the Free Bridge way?

A. It also leads directly into Iuka.

Q. And it was your understanding those roads were so constructed and opened to travel prior to the construction of the Oldham road?

A. That was my understanding, yes sir.

Q. State whether or not from your observation and from the physical features which you have described, the construction of the Oldham roads would tend to decrease or increase freight and passenger traffic on the Memphis & Charleston Railway Co.?

A. My personal observation, they would have no effect whatsoever on the freight or passenger traffic, either by increasing or decreasing it.

Q. I show you a map which has been heretofore introduced as Exhibit "D" to Mr. Bullen's testimony, and will [fol. 100] get you to state whether or not you prepared the colored date shown on that map?

A. Yes, sir, I prepared this map.

Q. Mr. Bullen has testified, I believe, that the map represents correctly in general, the boundaries of Tishomingo County. Is that your understanding?

A. Yes, sir.

Q. And that the proper outlines in light red or pink, represents the boundaries of the First Supervisors District. You prepared those from the official maps of those districts in the possession of the county?

A. Yes, sir.

Q. Like the boundary shown in dark red of the Burnsville Road District?

A. Yes, sir.

Q. Have you examined the County map, representing the boundaries of the Lee Highway?

A. Yes, sir.

Q. What is comprised on those County maps, within the Lee Highway District?

A. The Lee Highway District is comprised of the First Supervisors District and entire Burnsville Road District.

Q. This map correctly represents those features you have testified to?

A. In accordance with the map on file in the Chancery Clerk's office.

[fol. 101] Cross-examination by Mr. Cunningham:

Q. You say in your judgment, this don't effect the revenue bearing source of that community one way or the other?

A. That is my judgment.

Q. Did you make any investigation of the situation out there to post yourself as to whether it did or did not effect the revenue bearing resources of that community?

A. That is my judgment and my knowledge of it.

Q. Then you did post yourself as to the effect?

A. No, sir; I made no effort as to observing closely whether the new roads produce or fails to produce any additional revenue, but as I said before, there was old roads there before and I can't see how widening and straightening those old roads to make them suitable for automobile trucks, particularly when those roads do not lead to the loading tracks of the Railway Company.

Q. It is a fact one branch of that road leads to the Oldham pit, don't it?

A. Yes, sir.

Q. It is a fact the other branch road leads to the Allen Gravel pit?

A. Yes, sir.

Q. Isn't it a fact, those two branches converge and pass through that community north and lead to a consolidated school on the North boundary line?

A. That is right, yes, sir.

Q. Now it is a fact, that school was erected and located before the construction of this Oldham District; isn't it?

A. I don't know about that.

Q. You did not post yourself about that?

A. No sir.

[fol. 102] Q. It is a fact that the Oldham pit and the Allen Gravel Co., pits, two pits in the Oldham Road District?

A. Yes, sir.

Q. And they are very large and substantial revenue sources to the Memphis & Charleston Railway Co.?

A. They ship lots of freight and the Railroad Company appreciates the business.

Q. Did you make an investigation to see what conditions there would be out there in the absence of this District and this road, with reference to facilities for labor and families?

A. Well the roads——

Q. Did you post yourself on that?

A. Yes, sir.

By the Court: Go ahead and explain.

A. The new roads, I admit are a great convenience and comfort to the people who live in that community; they add ease to their mode of traveling and give better facilities for their children going to and from school; they had similar facilities before, but the roads not in good condition as at present.

Q. Mr. Davis, you ascertained did you not, the public school system of Mississippi; the school that is entitled to free delivery wagons, and that is afforded by the State of Mississippi, to citizens living up and down those roads, transportation facilities—you learned that or did you not?

A. I learned they had buses for children, but I also know as a fact, the Railroad Company pays a large proportion of the taxes of the Snowdown School District.

Q. That condition and convenience you talked about find- [fol. 103] ing out there, you find that condition and conveniences is now being enjoyed by rural communities in general, all over the Country, don't you?

A. Yes, sir.

Q. And road improvements and free delivery is all over the country?

A. Yes, sir.

Q. Did you make any investigation to know that the Oldham organization out there and the Allen Gravel Company organization would continue to develop their enterprises and continue to improve and afford this revenue bearing source of patronage, if these conditions had not been furnished the citizens?

A. In my opinion the roads have nothing to do with the revenue production of the Allen Gravel Co., or the Memphis Stone and Gravel Co.

Q. Stenographer was asked to re-read the question: Did you make that investigation?

A. No, I made no investigation.

Q. Now you are not prepared to say to this Court whether those economic organizations out there, or whether they could maintain their operations and furnish you their freight in the absence of that, are you?

A. I could say in my opinion, they would operate and continue to operate whether they had the roads or not.

Q. And you say that in the absence of any investigation?

A. And from my observations, yes, sir.

Q. You do not know what part of the labor used in these two great industries out there; you don't know what part of their laborers use these roads do you?

A. No, sir.

[fol. 104] Q. Do you know where the laborers there, which you say is a part of these industries, where they live, what kind of families they have and what schools they patronize?

A. No, sir.

Q. You do not know anything about that?

A. No, sir.

Q. You don't know where the church facilities are located, which afford the labor that support these two revenue enterprises out there, is situated?

A. No, sir.

Q. You don't know what relation this improvement has been to their church facilities?

A. No, sir.

Q. Made no investigation?

A. No, sir.

Q. You don't know, not having investigated it, whether the organizations that these two industries have developed, could be kept out there or not in the absence of these improvements?

A. I made no investigation, but I am quite sure they would be there whether they had a road or not.

Q. That is just a mere guess?

A. Based on common sense.

Q. Your common sense is that a man will raise his family in a mud hole just as easy as in a good place?

Complainants object to that.

Sustained.

Excepted to.

A. I am quite sure that gravel organization would stay there whether or not they had the road or not.

Q. Did you examine the farms up and down those roads [fol. 105] and in that Oldham Road District?

A. I observed them, yes, sir.

Q. Did you know anything about conditions prior to this improvement?

A. No, sir.

Q. You can't say whether those farms have been developed or not?

A. The farms appear similar to other farms in other parts of this section of the country; they do not seem to have undergone any special development on account of the roads.

Q. When was the first time you saw those roads?

A. Date I made the survey.

Q. When was that?

A. Few days before the map was made.

Q. When was that?

A. About January 1st, 1928.

Q. I assume from your statements that was about the first time you ever were in the Oldham Road district territory, except passing on the train?

A. No, sir, I was in there before.

Q. What were you doing there before?

A. About 10 or 12 years ago I made a survey for a track of the Gravel Company.

Q. Did you observe these conditions that you talked about?

A. Can't see that they have changed very much.

Q. You examined the farms when you came to make that track?

A. I had a very good impression of the nature of the farming country.

Q. Examined it 10 or 12 years ago?

A. No, sir, I did not examine it, but I had the impression [fol. 106] very little farming at that time and same condition now.

Q. Now are you prepared to tell this Court what condition those roads were in before this improvement; you say wagon roads there, — you prepared to say to this Court whether they were passable or unimproved?

A. Judging from the other roads which are in that territory and not in the Oldham road district, I would say they were passable.

Q. But that is a mere guess?

A. Yes, sir.

Q. The Memphis & Charleston Railway Co., say in their original bill, that Country out there has a gravel surface; construct gravel roads without any improvements? Tell

this Court whether that is true or not; you say you have been over it?

A. Well, this particular road has never had gravel applied to it and when graded, enough gravel in the soil to make it dry and easily passable at all seasons of the year.

Q. Then the Oldham road itself; that never had any gravel applied to it; just the natural gravel?

A. No, sir; there is enough gravel in the soil; does not need any gravel and I do not believe any gravel on the Oldham Road.

Q. You make that statement as an engineer; that is the truth?

A. That is my observation of it, yes, sir.

Q. You arrived at that too, from the same sources of common sense, you said awhile ago?

A. Yes, sir.

Court adjourned until 1:30 P. M.

[fol. 107] Mr. Cunningham resumed cross-examination:

Q. Mr. Davis, you spoke of the small acreage of land owned by Memphis & Charleston Railway Co., and Oldham Road District. You did not have anything to say about the purpose for which that land was used and the value of that land compared with other lands. Did you make any investigation as to whether their lands were really worth more than other lands you compared it to?

A. No, sir.

Q. Made no investigation about that at all?

A. No, sir.

Q. Then you are not prepared to say how many acres it is that Memphis & Charleston Railway Co., has in the District?

A. 58, about.

Q. You are not prepared to tell this Court whether that 59 acres is worth any more by virtue of its use and improvements, than any other 58 acres in thst district?

A. I would think for local taxation purposes, it is not worth any more.

Q. And you mean to say to this Court, that the value of that 58 acres owned by Memphis & Charleston Railway Co., is practically the same as the value of similar blocks throughout this district?

A. Yes, sir, for local purposes, purposes of taxation.

Q. It is a fact you have some little improved, haven't you?

A. Those improvements are in connection with the use of the Railroad for Railway purposes, and I might say, it was valued for general taxation purposes a good deal more, but for local taxation purposes, I wouldn't consider it worth any more than the adjoining lands.

Q. For what other purpose is that land used, except [fol. 108] Railroad purposes, if any?

A. None at all.

Q. Not any more than is necessary for railroad purposes?

A. None whatever.

Q. Isn't it a fact you have every foot of it covered with modern up to date railroad tracks?

A. No, sir, not all of it.

Q. I mean a line traversing east and west?

A. Yes, sir, main track right of way east and west.

Q. And it has all the main track right of way except a little triangle you referred to, for a side track?

A. No sir, that is section house.

Q. You have modern equipment, cross ties under those rails?

A. Yes, sir.

Q. You have your railroad dumps?

A. Yes, sir.

Q. And dumps and fills and highest degree of improvement?

A. Not the highest.

Q. Very high degree?

A. Considered first class railroad.

Q. You have already block system?

Complainants object to that, no block system at the time of the organization of the district.

A. There was no block system as of February 1st, 1926. It was installed in 1927.

Q. The improvements had been invested in the track at that time hadn't they?

A. Those that I mentioned, yes, sir.

Q. I want you to state to this Court, what the valuation of that railroad track is per mile, as per your official valua-

[fol. 109] tion that you furnished the Railroad commission, on fixing the rate?

A. I rather that be given you by the Tax Department. I am not an official, or have no official knowledge of the valuation.

Q. You assisted in making it, didn't you?

A. Not personally.

Mr. Hyde: Have you got available the valuation figured on this portion of the line with you, Mr. Davis?

A. Yes, sir.

Q. You got that with you; you know what the valuation is?

A. I know what it is, yes, sir.

Mr. Cunningham:

Q. Will you give that to us?

A. $35,000 per mile. I just know by having seen the correspondence since I have been up here.

Q. That is not the question I asked.

A. I don't know what the Federal valuation is.

Q. That is not the Federal valuation?

A. No, sir.

Q. I asked the valuation made and submitted to the Interstate Commerce Commission and approved by them?

A. I did not understand the question. No, sir; I haven't that. I do not know a thing about the Federal valuation.

Q. Now, I believe it is your duty as Engineer of the Railroad Company, to keep in touch with tax districts that are formed along the right of way isn't it?

A. Such districts as are assigned for checking.

Q. You do check those in your office?

A. Yes, sir, occasionally, not altogether.

[fol. 110] Q. It is a fact you were furnished promptly, data concerning the formation of the Oldham Road District at the time it was formed?

A. No, sir, no, sir; our office was not furnished any information in connection with the road district, Oldham Road District.

Q. Who furnishes that information?

A. That information is furnished to the tax commissioner

and he in turn calls upon the engineer to check up the matter.

Q. Who furnishes it to the Tax Commissioner?

A. Office of the Engineer, Maintenance of Ways.

Q. Who furnished that to them?

A. They send Engineer of the ground, and the Engineer interviews persons who are supposed to know where the boundaries are of various tax districts and then make a survey of the tax throughout the district.

Q. Don't you know it is your local Attorney's business to furnish you this information?

A. No, sir, he couldn't possibly get it.

Q. And you say it is not his business to furnish you any data relative to the organization and he couldn't possibly do it?

A. No, sir, he is not supposed to furnish us any information; he may pass upon the legality.

Q. How soon do you have this information furnished you in the Tax District touching upon your road?

A. That depends on the time it takes for various correspondence to pass through the various departments.

Q. How does that Tax Department get informaton of the formation of the district?

A. Couldn't say.

Q. It is a fact that this stretch of track, extending [fol. 111] through Oldham Road District as outlined by you, is a part of the general system between Memphis and the City of New York, isn't it; part of the main trunk line?

A. My information is that it is the property of the Memphis & Charleston Railway Co., operated by the Southern.

Q. As a part of its main trunk line, isn't it?

A. No, sir.

Q. The line from New York to Memphis?

A. Yes, sir, part of that line.

Q. But that is one of the trunk lines?

A. One of them, yes, sir, but not the main one.

Q. One of the main ones?

A. One of them but not the main trunk.

Q. It is on the main line between the City of Memphis and the City of New York?

A. Yes, sir.

Redirect examination by Mr. Hyde:

Q. Mr. Davis, you were asked on cross-examination relative to whether or not the Oldham Roads had been graveled. Do you wish to correct your testimony in that regard?

A. I based my testimony as to whether or not they had been graveled by my observation and apparently the gravel was so thin that it appeared to be the natural gravel in the soil. I have since been informed that it was graveled.

Q. In regard to your map, Exhibit "A", you show that the main Oldham Road District extends northerly past the boundary of the Oldham Road District and connects with the Free Bridge road. Does that correspond with your actual survey?

[fol. 112] A. Yes, sir, and correct.

Q. That goes outside of the district?

A. Yes, sir.

Q. But how far outside the boundaries of the district does it extend?

A. About a quarter of a mile.

Q. Now, Mr. Davis, assuming that the southerly boundary of the Oldham Road District, as it passes through the Section 29, had stopped at the northerly right of way line of the Memphis & Charleston Railway instead of the southerly main line, I believe you have already stated, that the inclusion of that right of way, added how many feet to the mileage within the district?

A. 4.247.

Q. Approximately what percentage of a mile is that?

A. .8 of a mile.

Q. Further assuming the railroad company, for the Oldham Road District, is assessed $35,000 for the main track, state what effect the inclusion of that extra .8 of a mile of main track right of way has upon the total assessment for 1926?

Defendants objected, for matter of calculation.

Overruled.

Excepted to.

A. $28,000.00.

Q. Now with reference to the facilities for travel to and from the two Gravel Companies, Mr. Davis, state whether

or not the Lee Highway has furnished access to the Gravel Companies that operate at Oldham?

A. Yes, sir.

Q. State how close the Lee Highway comes to the other [fol. 113] Gravel Company at Gravel Siding?

A. About 200 yards.

Q. I believe you stated that the Lee Highway is open all the year as a main highway?

A. Yes, sir.

Q. And has been for a number of years prior to the creation of Oldham Road District?

A. I think it was built shortly before the Oldham Road District.

Recross-examination by Mr. Cunningham:

Q. Mr. Davis, you corrected some of the fundamentals of your testimony this morning. You made this correction just after you returned to the witness chair after dinner, didn't you?

A. Yes, sir.

Q. Did you make any inspection of that road during the dinner period?

A. No, sir.

Q. Who gave you this information, that caused this radical change of mind?

A. Former Sheriff Bullen; he was laughing at me about it.

Q. And the former Sheriff Bullen tells you that you were wrong and you are going to take back-water and change your evidence?

A. Yes, sir, I believe what he says.

Q. Mr. Bullen was laughing at you pretty strong for making such a statement?

A. Well he thought it——

Q. Was rather funny?

A. Well, yes, sir. I asked him what he was laughing [fol. 114] about and he told me.

Q. Will you locate the school house on that map before you leave here?

A. The school house I believe——

Q. If you have a crayon, you might mark it.

A. Just for the sake of the record, I have outlined in

red on the map, my Exhibit "A", proper location of the school house.

Redirect examination by Mr. Hyde:

Q. Mr. Davis, will you please, right now, take the map, of the county, Exhibit "D" to Mr. Bullen's testimony, and refer to the county plat, block of sub-divisions, impose in a different color thereon, outline the boundaries of the Snowdown school district?

A. Yes, sir.

Q. And bring it back and introduce it?

A. Yes, sir.

Q. And in that connection, please, find out as near as possible, the exact location of the school house and on your return, please place it on the map?

A. Yes, sir.

Witness dismissed.

[fol. 115] T. C. Blackwell, being first duly sworn, testified as follows on behalf of the Complainant:

Direct examination by Mr. Mitchell:

Q. Mr. Blackwell, what connection have you with the Memphis & Charleston Railway Co., or the Southern Railway Co.?

A. Superintendent of the Southern Railway Company.

Q. Over what division?

A. Memphis-Charleston, known as the Memphis Division.

Q. How long have you been connected with the Southern Railway system?

A. About twenty-five years.

Q. Do you know about when the Lee Highway Road District of Tishomingo County was organized?

A. No, sir, only what I have been told.

Q. What is your information with reference to that, as to when it was opened up?

A. In 1925.

Q. What effect has the Lee Highway had with reference to increasing or decreasing passenger traffic and freight transportation since it has been open up?

Defendants object to that as irrelevant and immaterial.
Court reserved ruling.

A. It has greatly decreased our local revenues.
Q. What effect has it had upon the local passenger traffic at Iuka, Mississippi.
A. It has decreased our passenger traffic earnings at Iuka, since 1925.
Q. Local passenger?
[fol. 116] A. Local; I understand between 40 and 50 per cent.

Mr. Magruder: I want to make a specific objection to the testimony of this witness, on the ground that this testimony is necessarily and purely conjecture. If there has been a decrease in local passenger traffic, this witness has no possible way of knowing whether the Lee Highway or what caused it.

Court reserved ruling.

Q. You got those figures in your hand?
A. Yes, sir, our total passenger earnings.
Q. What effect has it had in transportation of local shipments?
A. Local freight shipments?
Q. Freight shipments?
A. Well the local business has fallen away to practically nothing.

Mr. Cunningham: Object to this evidence on further ground and want this objection to apply to the foregoing answer, that his testimony is not the best evidence; they have records showing these things and we demand they offer the best evidence.

Court reserved ruling.

Q. What do you contribute the cause of decrease of local passenger traffic and local freight transportation to?
A. Competition of the hard surface roads; automobiles, and trucks and buses.
Q. Has there not been a tremendous increase in the use of Automobiles in this vicinity since the construction of this highway?

Objection, because argumentative and leading.

[fol. 117] By the Court: Think in very leading form, but the Court will take judicial knowledge of that fact.

Q. What effect, Mr. Blackwell, has the construction of those two roads up there in the Oldham Road District, of increasing the earning capacity of the Memphis & Charleston Railway Co., in this particular vicinity, or in that district?

A. In my opinion, it has not increased it any.

Q. How long has the Memphis Stone & Gravel Co., been operating there at Oldham?

A. I cannot answer that.

Q. Was it operating there before January 1926?

A. My information is that it was.

Q. How about the Allen Gravel Co.?

A. The same.

Q. I will ask you whether or not there has been an increase in the tonnage of gravel hauling from these pits in the last year?

A. Yes, there has.

Q. What caused that increase in the tonnage?

A. The damage to the roads in the Delta caused by the floods and gravel moving to that territory to rebuild the roads.

Q. Where does the gravel go from these two pits; how is it hauled out there?

A. About half goes into Memphis and the other half, goes to Corinth down the M. & O. Road.

Q. How much revenue does the Railroad get from one class as compared to the other?

A. You mean the Southern Railway?

A. Yes, sir.

[fol. 118] A. On the Corinth shipments, we get an average of about $20.00 a car and about $30.00 a car on the Memphis shipments.

Q. I will ask you whether or not the construction of those two roads in the Oldham Road District had any tendency whatever to increase the tonnage of gravel as hauled from those two pits?

A. Certainly not.

Q. On the Memphis Division, which runs through this county and Oldham Road District, in hauling local freight at the present time, where are your terminals?

A. The local runs between Corinth and Memphis and we have a turn-round at Sheffield to Corinth and back to Sheffield.

Q. In the years 1923, 24 and 25, how many locals did it take between Corinth and Sheffield?

A. Four.

Q. What does it take now?

A. Three.

Q. I will ask you, at the prseent time do you run your locals from Sheffield to Corinth and back the same day?

A. Yes, sir.

Q. And heretofore, how did you have to run it?

A. Two locals, one left Sheffield and going to Corinth that evening, and one leaving Corinth and going to Sheffield.

Q. How do you run from Corinth to Memphis?

A. Have local each way.

Q. Is this condition confined to this particular section or is it general?

A. General.

Q. What is the railroads experience with reference to local profits of passengers and freight at the present time?

A. Generally, you mean?

[fol. 119] Q. Yes, sir.

A. The local passenger business has fallen off to such an extent we are taking off local trains all over the railroads.

Q. Local freight business?

A. Local freight business has fallen off so we are extending runs. The average run used to be 60 to 70 miles, now it is 100.

Cross-examination by Mr. Magruder:

Q. Now you speak of your decreased earnings in local passenger traffic and local freight transportation. What about your general earnings of your company in the past three years covered by your testimony, been decreased or increased?

A. 1927 we had a decrease in both freight and passenger earnings. 1926 increase over 1925.

Q. 1925 over the previous period?

A. I think they did.

Q. Did what?

A. Increased.

Q. What about the value of your railroad stock now as compared to 1924 and 1925?

A. The value of the stock?

Q. Yes, sir.

A. If you mean the condition of the property; it is very much improved.

Q. What about the value of the stock per share?

A. It has increased.

Q. How much?

A. Well, I haven't the figures.

[fol. 120] Q. Been a large increase hasn't it, Mr. Blackwell?

A. In what period?

Q. 1925, 26, and 27?

A. Gradually increased.

Q. Shortly prior to the year 1927, there was an enormous production at Sheffield, Ala., Muscle Shoals, prior to the year 1925, was there not?

A. I don't know anything about that, I was not in this territory then.

Q. How long have you been in this territory?

A. Since July 1st, last year.

Q. So if you were handling a large local business prior to 1925, you don't know anything about what was producing that business?

A. Nothing only what the records show.

Q. You have not undertaken to testify from the records, only your independent knowledge?

A. And the records.

Q. So you had no independent knowledge whatever, either of local or through business, freight or passenger, prior to that time you come on this division?

A. Only what the records show.

Q. Now then you don't think there has been any new business resulting to your company from the development of the Oldham Road District, so far as you can determine from the records and otherwise?

A. No, sir.

Q. Your company is not only interested in that business but any business?

A. Any business.

Q. It is as much to your interest to produce the develop-

[fol. 121] ment and business locations on your line in order

to maintain your present revenues as it is to encourage development that will bring in new revenues?

A. Yes, sir.

Q. In other words, whether old business or new business, it is best and means business to the railroad company?

A. Yes, sir.

Q. This proposition about Automobiles specially. In view of the fact Henry Ford built fifteen million cars, without changing his model, that is not simply a situation in the Oldham District?

A. No, sir, prevails everywhere.

Q. Prevails all over the United States so far as your observation goes?

A. Yes, sir.

Q. While it has been as you think, competitors over the Lee Highway with your railroad, also your railroad has been hauling a good many automobile trucks for sale and delivery each year?

A. Yes, sir.

Q. So while it has been competitive, you also have been getting a lot of revenue from Mr. Ford and Mr. Chandler and Mr. Buick?

A. We haven't gotten it from Mr. Ford. He has stopped shipping for some time.

Q. Back in 1926, he wasn't making that new car, he was making the old model T?

A. Yes, sir.

Q. Takes gasoline to run automobiles, up and down the Oldham Road and Lee Highway?

A. Only thing I know that runs them along.

[fol. 122] Q. Takes a little grease and oil?

A. Yes, sir.

Q. Your railroad don't object to hauling gasoline and grease and oil and parts for pay?

A. No, sir.

Q. Strikes me every day I see sometimes a half of the through run filled up with gasoline tanks and oil tanks, over your railroad?

A. No, I never saw half of a train.

Q. Very large proportion of your traffic is gasoline and oil and other commodities of that kind for automobiles?

A. I wouldn't say a large proportion, for we loose a con-

siderable amount on account of being peddled in trucks from town to town.

Q. In other words, your complaint about gasoline business, you don't get 100 per cent?

A. I haven't any complaint against the gasoline bsuiness.

Q. Got any complaint against automobiles?

A. No, sir, I have -one.

Q. Does the railroad company assume an attitude of antagonism to the development of the country because certain amount of automobile competition may develop over hard surface road?

A. I would say no to that.

Q. Whatever, in the way of good roads, good churches, good schools, good gravel pits and contented labor, developed and builds up the country, that means money in the railroad's pocket, doesn't it?

A. Well, I don't see how building up the schools and churches would mean money in the railroad's pocket and certainly building up of the roads, don't mean nothing in the railroad's pocket.

[fol. 123] Q. Did you ever know a railroad undertaking to run a road through the country where no churches and schools and expect to get business, in that kind of a country?

A. I have not been familiar with any road building in the past 8 or 10 years.

Q. The population of adjacent territory is the life of a railroad company?

A. Yes, sir.

Q. You can't have any population without roads and development, any material population?

A. No, certainly not.

Q. These gravel pits out east in the Oldham road district; that is kind of in the nature, not exactly a quarry, but loose gravel that is mined out, might say, mined on top out of the pits with steam shovels?

A. Yes, sir.

Q. And it takes a good deal of labor and skilled labor to handle those propositions?

A. Don't take no skilled labor to put a man to handling the steam shovels.

Q. You know what salaries are paid those men?

A. No, sir.

Q. You know whether they live within or without the Oldham Road District?

A. I don't know.

Q. Industrial development of the country, the schools, and churches and other things of that kind, that is not a local situation in Tishomingo County, but might say a competitive proposition everywhere isn't it?

A. Yes, sir.

[fol. 124] Q. Now that labor, operating these gravel pits in the Oldham District, if they did not have any good roads running upon these two highways, excepting out to the consolidated school, and to the churches, they necessarily would be deprived of these benefits they are now enjoying, wouldn't they?

A. I don't know anything about the conditions around the gravel pits, except the gravel pits are there. I do not know anything about the facilities they had before, or don't know anything about the churches or schools.

Q. In other words, you know the gravel pits were there before and are there now and are going to stay there, roads or no roads?

A. I don't say that.

Q. You do mean to say these things mean to stimulate the development of those gravel pits?

A. I don't know as going to improve the gravel pits; there has been a time when they shipped good deal more gravel than now.

Q. When was that?

A. When it was being used for railroad ballast.

Q. When was that?

A. I don't know the time, but the time when we operated a regular gravel service out of Corinth, that was used for ballast.

Q. At that time your railroad owned the gravel pit?

A. No, we never owned it; we had an agreement whereby we paid the gravel people for loading it.

Q. Didn't you at one time practically own all that land in Section 33 shown on this map?

A. We owned a part of it.

Q. Didn't you later sell that land to different individuals or companies in Section 33?

A. I am not familiar with that transaction.

[fol. 125] Q. Don't you know, as shown by your own map, that from Section 33 where your line enters there South to a point slightly above the Southeast corner of that Section where it goes out, there, that your right of way and track facilities there are 200 feet wide as against 100 feet on both sides of it, shown by your own map?

A. I don't know what right of way we own through there; I didn't make that map.

Q. You and these other gentlemen, Mr. Davis, are both railroad men, connected with the same railroad company?

A. Yes, sir, in different departments. He made that in Birmingham and I am located at Sheffield.

Q. That map shows right of way through Section 33, twice as wide as in Section 29 and 24?

A. The map shows for itself; I wouldn't want to testify to that.

Q. If that is a fact, then diagonally across that section, possibly a mile and a quarter, your track is twice as wide as anywhere, indicates that is a very important section of your railroad line, wouldn't it Mr. Blackwell?

A. Not necessarily.

Q. In other words, a track twice as wide across the whole territory, wouldn't necessarily indicate that was any more important than any other part of the line?

A. We don't have any track twice as wide, all standard ga-ge.

Q. The main right of way?

A. That wouldn't mean necessarily any more important, because our right of way varies all the way from Sheffield to Memphis.

Q. When was the first time you were ever over in the Oldham district, Mr. Blackwell?

A. About 2nd or 3rd of July last year.

[fol. 126] Q. About,—you say you were testifying about these local receipts for passenger and freight—you got your records here with you, Mr. Blackwell?

A. No, sir.

Q. Where are your records?

A. They are in the Sheffield office.

Q. And you are here for the trial of this case, with your records in Sheffield office. Is that right?

A. That is right. I did not know anything about the case when I was summoned down here.

Q. When did you first find out about the organization of the Oldham Road District, the creation of this district?

A. This morning.

Q. Never heard of the Oldham road district until this morning?

A. No, sir.

Q. So they brought you over here and plunked you on the witness stand without any records or without knowing what it was all about until this morning?

A. Yes, sir.

Witness dismissed.

At the close of the testimony of Mr. Blackwell, defendants asked to have his evidence excluded for the reason he says it is based on records and he has such records in his office at Sheffield, same being accessible and no trouble to produce in this hearing.

Court overruled objection, not attempting to use records as a guide.

Excepted to.

[fol. 127] D. F. Rice, being first duly sworn, testified as follows on behalf of the complainant:

Direct examination by Mr. Mitchell:

Q. Mr. Rice, what official position do you hold with the Mobile & Ohio Railroad?

A. Division Superintendent.

Q. Give from what place to what place.

A. From Cairo to Okolona.

Q. How long have you been Superintendent of that Division?

A. Since February 1st, 1923.

Q. You familiar with local transportation of the M. & O. Railroad Co., before and since the organization of the Lee Highway?

A. Yes, sir.

Defendants object to that evidence, being irrelevant, and immaterial.

Court reserved ruling.

Q. I will ask you to state whether the local passenger traffic in this immediate territory, has increased or decreased since the good roads have been built along and parallel to the main lines of the Southern and M. & O.?

A. Decreased on M. & O.

Q. What per cent would you say the local passenger traffic has decreased since the construction of these roads?

A. Well, I would judge about 50 or 60 per cent local business.

Q. What effect have these roads had upon local freight? [fol. 128] A. Less than car load lots?

Q. Yes, sir.

A. Well, somewhere about the same.

Defendants specifically object to that, for does not make any difference whether in full car load lots or part car load lots.

Objection overruled.

Excepted to.

Q. What effect has the decrease in the local freight, caused on lengthening your runs?

A. Well, in this immediate territory we are doing now with two local trains, we did use three. About 1925, I think it was latter part of '25, we reduced to three, and in November in '27 we reduced to 2.

Q. Mr. Rice, assuming that this is Oldham District, consisting of about 3,000 acres of land, and this road runs down to Oldham Gravel Pit, and that this road runs down to Allen Gravel Pit, and there is no depot in this territory, and all the gravel is billed out in Iuka, what effect would those two small roads have on the revenue of the Memphis & Charleston Railroad?

Defendants object to that, doe*ns*'t show he knows.

Court overruled objection.

Excepted to.

A. I don't see why would be of any benefit.

Q. Is it generally true in the country as a whole, specially on railroads where the hard surface roads runs along and parallel with the roads, that the condition you spoke of in this immediate territory, is general?

A. Yes, sir.

[fol. 129] Cross-examination by Mr. Cunningham:

Q. How do you know it is general?

A. General observations, traveling around and hearing the different men talking around with the different railroads.

Q. You just hear of it in other places, you don't know whether it is?

A. Know to my own knowledge, actually.

Q. Mr. Mitchell asked you the hypothetical question. Let me ask you about that Mr. Rice. Suppose that road there, say one branch of it going into the railroad company's right of way, and the other going into another place, and suppose we had an industrial center, by the operation of that industry, you could get labor out there to operate it, and feed the road, and freight shipments, say possibly quarter million dollars of equipment a year, that would be business?

A. Yes, sir.

Q. That would justify you to improve that community for the citizens to live there?

A. Yes, sir, lend to the earnings of the road.

Q. Yes, sir, lend to the earnings of the road, if industries would feed the road to the extent of quarter million dollars of shipments annually; that would be good for the railroad to help develop their railroad and keep them good labor there?

A. Yes, sir.

Q. And good railroad business would necessarily do it and get actual results, wouldn't it?

A. Yes, sir.

Q. Speaking about the M. & O. loosing. Is the M. & O. revenue greater or less than they were as a whole, total revenues, annually greater or less?

[fol. 130] A. Which years?

Q. Last three years?

A. Yes, sir.

Q. Increased every year?

A. No, sir, decreased last year.

Q. How much did it decrease last year over the year before?

A. I haven't got the exact figures, but pretty good decrease.

Q. You mean the road did not earn as much last year as the year before?

A. No, sir.

Q. Wasn't that due to improvements?

A. No, there has been less business than they did a year ago.

Q. Well, you say you had less business in '27?

A. In '27 than we had in 1926.

Q. Now, you had a good deal more in '26 than '25?

A. No, I think less in '26 than in '25,—is my recollection.

Q. You had some other competition other than dirt roads that effected this particular situation?

A. No, sir, not more than we always had.

Q. Did M. J. & K. C. build a line into Jackson, Tenn.?

A. It has been there for a long time, it was there when I moved to Jackson, and I moved there in '21. That line was in Jackson in '21 when I moved there.

Q. Yes, but little narrow gage line?

A. No, G. & M. was running it.

Q. Then you say the M. & O. business has gone to the bad?

A. No, not as good in '27 as '26.

Q. You report under your management, your road is gradually dying?

A. No, it is gradually getting good. You live on it, you ought to know.

[fol. 131] Q. Well you say it is gradually getting good; what you complaining about?

A. I am not complaining.

Q. Thought you were telling the court it was failing or going down?

A. No, better.

Q. The value of the physical equipment is a great deal greater?

A. Yes, sir.

Q. And the stock is worth a good deal more?

A. I don't know; I don't deal much in stock.

Q. But you know M. & O. stock is better on the market than it was?

A. No, I do not.

Q. Who is the custodian of that stock?

A. I don't know.

Q. How long has that M. & O. Railroad been going down in its business?

A. Well, I think 1924 *of* '5, about the best year we ever had.

Q. It went up from 1924 and '5?

A. Yes, sir.

Q. Were you Superintendent of that Division at that time?

A. Yes, sir.

Q. Can you give the court any idea what started it down?

A. I guess some of the business didn't do quite as much business as did other years; some of it was decreased in passenger business and freight business.

Q. Back in those times, you were hauling all the niggers out of the country into the North?

A. Hauling some of them.

Q. When they got off to New York and Pennsylvania and Detroit, that necessarily cut down your traffic?

A. Cut it down -long with the competition of buses and automobiles.

[fol. 132] Q. Talking about competition of buses and automobiles. They brought you a good deal of business in the way of Automobile shipments, didn't they?

A. Yes, sir.

Q. Brought you lots in shipping in parts.

A. Some, yes, sir.

Q. Casings?

A. Yes.

Q. Shipping in gasoline to run them with?

A. Yes, sir.

Q. That is revenue traffic?

A. Good business.

Q. Oil quite a traffic?

A. Yes, sir.

Q. The country is using more hardware and heavy freight of various kinds on these roads?

A. I don't know whether any more or not, maybe some little increase, I couldn't tell you about that.

Q. Mr. Mitchell asked you about parts of cars, or shipping whole cars. You don't object to carrying out parts of cars?

A. Not if we get enough.

Q. So when you run out parts of cars and run out whole cars, you don't object to that?

A. No, I wouldn't object to whole cars.

Q. You have any objection to reducing of the parts of cars?

A. Have that much reduction in your business.

Q. If you don't get back in the whole cars. If a man, a gasoline dealer goes to buy anything and then, parts I mean, and then goes back into the whole cars, that don't hurt you?

A. We get the same amount of business from the gasoline dealer; we get the car load lot to the distributing point, [fol. 133] but we don't haul the shipments around to the different small places we used to handle.

Q. That is the hardest business you have; the small cars, you have to stop at local points?

A. How do you mean, hard to handle?

Q. Yes, sir.

A. No, of course, you have to handle it more.

Q. It takes your time and labor?

A. Yes, sir.

Q. As a railroad man, I mean learned in economic affairs of railroads, would you be willing for the surface roads up and down the M. & O. to be moved and leave you over in the woods?

A. No, personally I would like to have good roads.

Q. I mean from the railroad standpoint, would the railroad kill these good roads if they could, would you move them from your road if you could?

A. No, I want them there. I would like to have lots of lateral roads.

Q. Lateral roads bring lots of business; bring timber?

A. Bring everything; where they go somewhere and anything to bring.

Redirect examination by Mr. Mitchell:

Q. Mr. Rice, what is the highest tariff rate on local freight or car load shipments?

A. The local rate is the highest.

Q. What effect did the Oldham Road District, organization of the Oldham Road District have upon the boll weevil running niggers out of this district?

A. You will have to get Mr. Cunningham to answer that question.

Witness dismissed.

[fol. 134] W. H. FORELINE, being first duly sworn, testified as follows on behalf of the complainant:

Direct examination by Mr. Mitchell:

Q. Mr. Foreline, what connection have you with the M. & O. Road?

A. Train Master.

Q. Located at Corinth?

A. Corinth, Miss.

Q. How long have you been Train Master?

A. Seven years.

Q. Located at Corinth during that time?

A. Been at Corinth five years.

Q. Mr. Foreline, what effect does the hard surface roads running parallel with the railroad, have upon the local passenger transportation? For instance, Lee Highway and Gulf on the M. & O.?

A. In a general way, I would say it has reduced the local passenger traffic between 40 and 60 per cent. I have no figures at present.

Defendants object to that for same reasons.

Court reserved ruling.

Q. What per cent would you say that it has reduced the local freight transportation?

A. At least 50 per cent.

Q. Is that——

Defendants make same objection.

Court reserved ruling.

Q. Is that a local situation, or a general situation over the country as far as you are able to ascertain?

[fol. 135] A. So far as I know, it is a general situation.

Q. Located at Corinth as you are, what effect does the hard-surface roads have upon the hauling of gas and beverages, and such as that?

A. On my district we handle no more gasoline as a local freight, or beverages, coca-cola and things of that kind, don't ship by railroad.

Q. Before the construction of these hard surface roads along this line, did the railroad get that freight?

A. Yes, sir, we used to have regular oil days for each week, and we handled Coca-cola and soda water every week.

Q. Mr. Foreline, if Oldham Road District is located out east of Iuka, here, and there is a main thoroughfare, as indicated by this blue print up here, known as the Free Bridge road and one on the South, and parallel to the right of way of the Southern Railway Company, through this district, what benefit, as to revenues, would you say the construction of these two small roads in this territory, would have on Memphis & Charleston Railway Co.?

A. One point that seems——

Q. I say what effect would it have on the increase or decrease in revenue, situated as it is here at Iuka and no depot in the territory?

A. No depot on the railroad where comes on the railroad—no loading track or facilities?

Q. Yes?

A. Have no effect whatever.

Object to the question as a hypothetical question, for not true, they do have loading facilities.

Court reserved ruling.

[fol. 136] Cross-examination by Mr. Cunningham:

Q. Mr. Foreline, I believe you live in Corinth?

A. Yes, sir.

Q. Are you familiar with the location of the two gravel pits here, the old Memphis Stone & Gravel Co., and Allen Gravel Co.?

A. Only as they effect the Southern Railroad, not from highway standpoint.

Q. Only as they effect the Southern Railroad, not from highway standpoint?

A. Yes sir.

Q. As a matter of fact, you do know those two gravel pits are supplied with siding and loading facilities, where they handle possibly 7 or 8,000 car loads of gravel per annum?

A. Yes, sir load gravel to both pits.

Q. Now, then, anything like that, 7 or 8,000 car loads of gravel per annum, that is an enormous volume of business for that railroad?

A. Yes, sir, in tons.

Q. Takes a considerable operating force, administrative force, to handle and load that great quantity of gravel?

A. Yes, sir.

Q. You know whether those people live, whether they live in the Oldham road district or the Lee highway that do that work?

A. No, sir, I don't know that.

Q. Well, now, with reference to these questions Mr. Mitchell has asked you about, effect of these rock roads to the railroad company, not only in the road system having roads parallel with the railroad tracks, but also having lateral roads all over the country, they bring in business to the M. & O.?

A. In some places, yes, sir.

[fol. 137] Q. This general all over the state?

A. Generally I would say, for they usually go to the local centers.

Q. Well hauling in cotton; that ultimately goes to the railroad for transportation?

A. Ultimately comes, yes, sir, cotton does.

Q. The Railroad Company does not undertake to assume the position that all hard surface roads must be built at right angles to the railroad tracks, and there should be no parallel roads constructed throughout the railroad's territory do they?

A. I am reasonably sure the railroads have never taken a position like that.

Q. As a matter of fact, whatever builds up a territory, brings a railroad?

A. We admit that, yes, sir.

Q. And whatever builds up and makes better homes and better schools and churches, and makes a greater decree of prosperity in that Oldham District, with these two roads going down there, would necessarily be beneficial to the railroad?

A. Would be of some advantage, yes, sir.

Q. Now one of these latterals, the West branch, what we call the Gravel Siding on this map, doesn't cross the railroad track and doesn't reach the highway at all? And the Oldham road comes down and crosses the railroad track in Section 34, and extends short distance south to the Lee Highway?

A. Yes, sir.

Q. You see where it runs with that green line on the north?

A. Yes, sir.

Q. That is a material situation for the development of any territory to run up main highways?

[fol. 138] A. Would be if had a loading station and any bs*u*iness actually moved to the railroad.

Q. If two loading stations for those gravel pits, handling around 7 or 8,000 car loads of gravel yearly, would be a situation?

A. I don't think the road would have any connection with the gravel pits, because the gravel pit was there before the road was built.

Q. That wouldn't mean anything to the railroad company unless those two gravel pits are maintained and operated in the future by hands, would it?

A. No, would not do the railroad any good if not under operation.

Q. In other words, the operation of those two gravel pits, with the large revenue of approximately quarter million of dollars to the Railroad, would be cut off if no labor available to operate those two gravel pits?

A. Couldn't operate without labor, no, sir.

Q. About this gasoline business and these beverages. Say you don't handle coca-cola and gasoline any more?

A. Almost none any more, specially coca-cola and soda waters and local gasoline is distributed, not hauled by the railroad.

Q. Well bottling business, places all over the country, where their stuff is bottled and put up?

A. Yes, sir.

Q. Corinth and everywhere else?

A. Yes, sir.

Q. Well in one stage of the game, the glass and bottles and syrups and sugar and other commodities out of which their syrups are made, are transported to the country where they have these bottling works?

[fol. 139] A. Yes, sir.

Q. So while you don't handle the beverages itself, you do as a general proposition, get the through haul of the bulk of the commodities?

A. Yes, sir.

Q. So far as this automobile competition is concerned, we haven't got any automobile factories in Mississippi?

A. Not that I know of.

Q. And these automobiles from Henry Ford and Buick [illegible] other concerns, they are shipped in here by rail from the various factories, from Detroit, Chicago, Ohio and elsewhere?

A. Some are and some shipped into distributing points and delivered out.

Q. But 99 or 100 per cent of that business comes in from the factories by Railroad?

A. I would say so, yes, sir.

Q. We have no great oil refineries or gas plants in Mississippi?

A. No, sir, not yet.

Q. Possibly from your suggestion, you might own a little stock in the Amory Petroleum Co., together with myself and the Court?

A. I would answer that the same way—not yet.

Q. Well from the refineries and the gasoline plants, this oil, gas, grease and other commodities going into the operation of this enormous automobile traffic of our country, for business and for pleasure, that is railroad business, ordinarily comes in by train?

A. As a general proposition we move it in bulk.

Q. As a railroad man you have given in your judgment for the complainant. Do you believe the hard surface roads and development of the country, including this automobile proposition, including gasoline and oil, grease and [fol. 140] parts of automobiles, you think that development of the country under those circumstances is increasing or decreasing railroad business and population?

A. Increasing it.

Q. If it was in your power as representatives of the railroad company, to eliminate this development of the country, hard surface roads, including automobile competition, also taking into consideration the automobile business, oil, gasoline, etc., that goes to the railroad company, and also taking into further consideration the advantage of lateral roads that bring in cotton and other commodities to the railroad, would you believe that would be good business or bad business?

A. I don't think the development should be eliminated; I think the competition should be eliminated; I don't think the development of the country should be hindered anyway.

Q. You think we should have all these developments and hard surface roads, but no transportation should be over these hard roads in competition with the railroad companies?

A. In a measure, that is what I mean, yes, sir.

Q. In other words, you mean the National and State Highways, simply should be for pleasure cars and not for traffic?

A. In competition, I should say not.

Q. In other words, it is all right to use a Lincoln Sedan on a National or State Highway, but not right to use a truck in competition with Railroads to haul commodities for consumption?

A. I don't think it is right.

Q. In other words, just to be perfectly clear, the Lincoln Sedan would be all right but the truck would not be right? [fol. 141] A. The Lincoln Sedan used as a pleasure car would be all right?

Q. But the truck hauling car wouldn't be all right?

A. The truck and buses wear out the roads, which we have labored for and paid for, and all wrong.

Redirect examination by Mr. Mitchell:

Q. Is the railroad fighting good roads?

A. No, sir, not to my knowledge.

Q. You think the construction of those two roads up here, will benefit this railroad as an acre will be taxed eighty times as much as an acre out here?

A. No, sir, I would think not.

Q. You think the railroad company should pay 37 per cent of the taxes in Tishomingo County to keep up this road for its competitors?

A. I would not think so unless they own enough in the county to justify the 37%, as compared with the other property in the county.

Recross-examination by Mr. Magruder:

Q. Say you don't think the railroad property ought to be assessed 80 times as much as other lands in the Oldham District and elsewhere?

A. Yes, sir.

Q. But if the railroad property, under assessment adjudicated by the legal authorities of the State of Mississippi, including its railroad track, is worth 40 times as much, or [fol. 142] 80 times as much per acre, as farm land in that territory, then it ought to pay its proportionate part of the tax, oughtn't it, Mr. Foreline?

A. I don't just exactly get that question clear. In fact, I am not very familiar with the tax,—if the railroad property is worth 80% of the value of the county, I should say that be taxed in comparison with the balance of the county.

Q. In other words, you do not think there ought to be any discrimination of taxation of assessment of property based on values, just because that property happened to belong to a railroad company do you?

A. No, sir; don't think there should be any discrimination whatever.

Witness dismissed.

Joe White, being first duly sworn, testified as follows on behalf of the complainant:

Direct examination by Mr. Mitchell:

Q. What connection have you with the Memphis-Charleston Railroad Company?

A. I am employed as freight agent at Corinth, Mississippi.

Q. Mr. White, how are the shipments of gravel from the gravel pits in the Oldham Road District handled by the Memphis-Charleston Railroad Co?

A. The majority of these shipments are loaded at the pit and carried to Corinth, shipments being billed out at [fol. 143] the pits or by billing agent at Iuka.

Q. Where is the tariff or rate placed on the bill of lading?

A. Well I don't know as it is placed in the bill of lading.

Q. Where is it figured?

A. On shipper's bills, collected at destination. The charges are extended and figured on the correct scale of weights at destination.

Q. About what per cent of the gravel that is shipped over the Memphis & Charleston Railroad Co., is diverted from the the Southern at Corinth?

A. Well I would say possibly 50%.

Q. What becomes of the other 50%?

A. Other 50 per cent is loaded at Corinth and goes west on the Southern Railroad over beyond the Southern Railroad, going down through Memphis, Middleton and Grand Junction,——

Q. Mr. White, what effect has the building of hard surface roads had upon the local shipments of freight?

A. Well I would say that they have tended to materially decrease the Southern Railroad's revenues.

Q. What are the chief commodities shipped in Iuka and this vicinity from Corinth East?

A. Shipments of feed, hay, flour, meal, gasoline and oil.

Q. How about beverages?

A. Well we are not having any beverages at this time.

Q. I will ask you whether you have got any comparative figures with 1923 and 1927?

A. Yes, sir, I have a statement I prepared yesterday, compiled from the records in my office for the months of January and February and March of 1923, and also the same months, 1927, showing the total number of pounds of [fol. 144] less — car load freight forwarded from Corinth, Miss., proper, to Glens, Cober Spur and Iuka, Miss. The total number of pounds of less car load freight forwarded from Corinth, Mississippi, to these stations for the months of January, February and March, 1923, aggregate 628,744 pounds. The total number of pounds forwarded from Corinth, Miss., proper to these stations, for the same months, of 1927, aggregate 85,014 pounds.

Q. A decrease of how much?

A. A decrease of 543,730 pounds.

Q. I will ask you what is the difference with reference; what was hay and feed for the 3 months for the two years?

A. During the first three months of 1923, there were forwarded from Corinth, Miss., proper, to stations mentioned, hay and feed, aggregate 258,099 pounds. Flour and meal 39,415 pounds, Beverages 8,990 pounds, Patroleum products 41,588 pounds.

Q. Now take January and February?

A. For the same months, 1927, there were forwarded from Corinth to these stations: Feed and hay, 28,388 pounds, a decrease of 229,711 pounds. Flour and meal, 14,006 pounds, a decrease of 25,410 pounds. There were no beverages forwarded, meaning a total decrease of 8,990 pounds for this

period. Petroleum products, 5,579 pounds, a decrease of 36,009 pounds.

Q. Have you got that paper in written form so you can file it as an exhibit to your testimony?

A. Yes, sir.

Defendants objected to this for the reasons, does not show anything.

Court reserved ruling.

We here offer this as an Exhibit and ask the Stenographer to so identify and mark same.

Paper was here marked Exhibit "A" which is as follows:

[fol. 145] EXHIBIT "A" TO TESTIMONY OF JOE WHITE

"Statement of tonnage of less-carload freight forwarded from Corinth, Miss., proper to Gleus, Cokes Spur, Burnsville, Walkers Switch, and Iuka, Miss., for months of January, February, and March, 1923, and the same months of 1927

1923	Pounds	1927	Pounds	Decrease
Jan.	186,408	Jan.	25,288	161,120
Feb.	200,633	Feb.	33,201	167,432
Mar.	241,703	Mar.	26,525	1,115,178
Totals	628,744		85,014	545,730

Statement of Principal Commodities Handled During the Above Period and Decrease, in Pounds

1923	Hay & feed	Flour & meal	Beverages	Pet. pro.
Jan.	81,010 lbs.	11,323 lbs.	1,070 lbs.	15,919 lbs.
Feb.	87,321 "	20,828 "	5,620 "	12,889 "
Mar.	89,768 "	7,265 "	2,300 "	12,780 "
Totals	258,099	39,416	8,990	41,588
1927				
Jan.	12,751 lbs.	2,940 lbs.	0 lbs.	2,292 lbs.
Feb.	6,900 "	4,246 "	0 "	1,945 "
Mar.	8,737 "	6,820 "	0 "	1,342 "
Totals	28,388 "	14,006 "	0 "	5,579 "
Decrease	229,711 "	25,410 "	0 "	36,009 "

[fol. 146] Cross-examination by Mr. Cunningham:

Q. What is your trouble anyhow, what did that?

A. This decrease?

Q. Yes, sir.

A. Well, I would say that motor trucks, this tonnage freight handled formerly by the Southern Railway, is now

being handled by motor trucks. We have three wholesale houses in Corinth and they distribute their products throughout this territory by motor trucks, or in my judgment it is being handled by trucks.

Q. Nearly put out of business, haven't they?

A. Almost on some commodities, we are out of place.

Q. Speaking of the question of beverages and——

A. Beverages and petroleum products.

Q. Well you handle the materials to make up beverages, all but water?

A. I don't know about that.

Q. You handle the sugar and all that stuff?

A. In your words, I don't know the ingredients going to the making of beverages.

Q. But whatever ingredients are, you ship a good deal of it, don't you?

A. I don't know; not knowing what they are, I don't know whether we handle them or not.

Q. Then not knowing that, you haven't any complaint about that?

A. Not about the beverages, no, sir.

Q. Ship good many automobiles more than you shipped?

A. We are receiving more. We possibly are receiving more than we did at that time.

Q. That adds good deal to your revenues?

A. Yes, sir.

[fol. 147] Q. Isn't automobiles one of the greatest sources of revenue you have, taking into consideration parts, gasoline, grease and oil; one of the greatest the railroad has?

A. I couldn't answer that.

Q. It is mighty good; you will admit that?

A. It is mighty good; you will admit that?

A. Well it is good revenue commodity, yes, sir.

Q. Yes. You figure ought not to have any roads to run on after they get them; that the idea?

A. No, sir; I haven't said that. No, sir, I don't say that.

Q. Your road is a great deal more valuable than it was back in 1923; Southern Railway Company?

A. I don't know.

Q. Memphis & Charleston Railway Company?

A. I don't know whether it is or not. I couldn't say.

Q. Stock is worth a great deal more?

A. Possibly so, I don't know.

Q. Fact is you don't know what effect it has had on the road do you?

A. Not generally, but locally I feel that I do.

Q. You are not doing much business locally?

A. Not locally; that is within the territory, that is in a radius of 40 or 50 miles of Corinth. I know the local business has decidely decreased.

Q. You remember in 1923 there was a saw mill in every hollow of this country?

A. Yes, sir.

Q. Mostly virgin timber?

A. Yes, sir.

Q. People had to go out and conduct these industrial enterprises, didn't they?

A. Yes, sir.

[fol. 148] Q. When they got the timber cut off, they had to move on?

A. I don't know what happened to them.

Q. They disappeared, didn't they?

A. To a certain extent.

Q. People getting the timber cut off and moved the saw mills. You can't hardly find a saw mill operating now?

A. Yes, sir, I think we saw two or three this morning.

Q. When did they get there?

A. I don't know when they got there, but they were there.

Q. Were they steam mills or gasoline mills?

A. They were steam mills, because I saw a smoke stack and smoke boiling out.

Q. You hauled them in there?

A. No, sir, I don't know that we did.

Q. You get the benefit of the lumber?

A. Not in all cases, no sir; lots of lumber being trucked also.

Q. Being trucked where?

A. Local markets.

Q. To local markets?

A. Put up to the retail dealers, where it is placed to the ultimate consumer.

Q. But the fact is, all the local men dress and ship it, where it goes to, over your railroad?

A. I would say possibly a greater extent shipped away.

Q. In fact the saw mill industries have wonderfully decreased since 1923?

A. Yes, sir.

Q. You are not prepared to say what effect that has on the conclusion and figures you have produced here, are you?

A. No, I haven't any figures on that, not on the lumber industry.

[fol. 149] Q. But I say, upon the figures you have given here, you are not prepared to say what that saw mill deterioration had been on that, what caused that, have you?

A. No, I couldn't say just what effect that would have.

Q. Now you picked out a few points here, general freight receipts less in 1923?

A. Well I have no figures on that, but I would say not.

Q. You say you were doing less business from every standpoint then than in 1923, is that right?

A. I haven't any figures on that.

Q. How come you picked out those two or three little things to get figures on?

A. Mr. Mitchell informed me that he wanted me to testify in this case, and he did not give me any information as to what he wanted, so I used my head and got this up to have something. I knew nothing and had to have something.

Q. In using your own head, why didn't you get the totals to that and give that record?

A. The reason I did not have any more figures, I did not have sufficient time to get it up.

Q. You don't know what the general receipts would be, what the general receipts would be if you had time to look it up; the general business whether improved or decreased?

A. I don't think,—I would say not increased.

Q. Business decreasing?

A. I don't know as decreasing, but I say they are not increasing general business.

Q. Can you explain to the Court, why your general business is decreasing, why it is, you have better physical equipment by far, don't you, than you had in 1923?

[fol. 150] A. Don't know that we have.

Q. And your stock is very much higher?

A. I don't know that.

Q. You said a while ago it was higher all right?

A. I said possibly so. All I know about it, is newspaper reports.

Q. Assuming that stock is a great deal higher, and assuming your physical equipment is a great deal better, how do you account for that, if your business is going to the bad all the time?

A. I did not say our business was going to the bad all the time. I said I did not know that it was decreasing, but certainly not increasing.

Q. But you are not willing to state it was decreasing?

A. I said a minute ago, our local freight business had decreased, specially to Corinth.

Q. You think that is all on account of the organization of the Oldham Road District do you?

A. The Oldham Road District must have had some effect on this; if I know where it is, if it embraces this territory.

Q. And is included in this lawsuit?

A. Yes, sir.

Witness dismissed.

[fol. 151] E. S. Davis, being recalled by the complainant, testified as follows:

Direct examination by Mr. Hyde:

Q. You were asked to make out on Exhibit "D" to Mr. Bullen's testimony, the boundaries of the Snowdown School District. Have you done so?

A. Yes, sir.

Q. How have you indicated; in what color have you indicated those boundaries?

A. Indicated it in green.

Q. What territory not embraced in the Oldham Road District, is embraced in the Snowdown School District?

A. The Snowdown District embraces all of the Oldham Road District, and in addition, the remainder of Section 29, and three-fourths of Section 21; all of Section 22, and fractional part of Section 23, 26 and 35.

Q. Will you please put on the map as you were requested to do, the approximate location of the Snowdown school, and indicate what it is?

A. Witness does so.

Cross-examination by Mr. Magruder:

Q. Mr. Davis, I believe that this map here on the wall, which appears to be Exhibit "A" to your testimony, was prepared by you?

A. Yes, sir.

Q. Now then isn't it a fact, that throughout the entire distance in Section 33, traversed by your railroad track, to the right of way, is 200 feet wide as against 100 feet wide, [fol. 152] both east and west?

A. According to my information, it is, yes, sir.

Q. Your company formerly owned that last Section 33, or a greater part of it, and operated this gravel pit, directly?

A. So I am informed.

Q. And used that gravel as ballast for your track at that time didn't they?

A. Yes, sir.

Q. Later you sold these lands in Section 33, to individuals or companies, who are now operating those pits?

A. I don't know that positively; that is my information.

Q. Well when you did that, you know the railroad company did reserve their right of way, including loading equipment and facilities, 200 feet wide clear across that section, didn't it?

A. That is what our map indicates.

Q. Well it is just naturally what they did do there, isn't it, it is just naturally a fact they did do that?

A. I suppose so.

Q. Something over a mile as it runs diagonally across that section?

A. Yes, sir.

Q. You retained that right of way, with the siding, passing tracks and other facilities necessary there?

A. My impression is, that the tracks, on the gravel siding, is owned by the Allen Gravel Co.

Q. Of your right of way?

A. No, sir, material and tracks.

Q. But anyway, if owned by the Company, they are on your right of way and by your permission for the purpose [fol.153] of loading gravel and shipping it?

A. Yes, sir.

Q. And the necessity of having that right of way 200 feet wide across that section, resulting from the enormous volume of gravel shipped at that point?

A. No, sir, we have, that is our entire width of right of way, is 200 feet; has not any reference to the gravel.

Q. But it does happen it is 200 feet wide across that section where these two gravel pits are located in the Oldham Road District, and 100 feet on both sides of that section?

A. Yes, sir, that is right according to our maps.

Q. That school house, as you have located it upon the map, now in the N. E. ¼ or Section 28, is located in the Oldham Road District, isn't it?

A. Yes, sir.

Q. Just a short distance east of what is indicated there as the Oldham road?

A. Yes, sir.

Q. There is a school road or connected, for the patrons of the school, built out west a short distance, to the Oldham road?

A. Yes, sir.

Q. So then that consolidated school, by that school road, for its patrons, is connected up with the entire road system of the Oldham Road District?

A. Yes, sir.

Q. And thence on down to Lee Highway?

A. Yes, sir.

Redirect examination by Mr. Hyde:

Q. State whether or not it is a fact that the width of the [fol. 154] right of way of the Southern Railway system, varies over the whole system?

A. Yes, sir.

Q. What accounts for the variation, from your knowledge?

A. The variation is due practically to the difficulty in acquiring the full charter width.

Q. That was in the old days of construction?

A. Yes, sir.

Q. Matter of fact the old lines of the Southern Railway constructed in '50 or '60.

A. Yes, sir.

Q. And some places they were able to acquire only 50 feet and some 200 and some 100 feet?

A. Yes, sir.

Q. In fact the charter of the Memphis & Charleston gave it 200 feet?

A. Yes, sir.

Q. What if you know, is the desire of the company in regard to the width of its right of way?

A. General width required was 100 feet on either side of the track.

Recross-examination by Mr. Magruder:

Q. How old are you Mr. Davis?

A. Forty.

Q. What do you know about the procedure of condemnation of railroad right of way back in 1850?

A. Well I know that the charter of most of the railroads forming the Southern Railway Company, gave them the right of acquiring 100 feet on either side of the center of [fol. 155] the main track and I know the railroad company had the right to use a man's land and construct this road and the land owner had five years to have the width of the right of way limited, and if he failed within a period of five years, under the charter of various roads constructed in the early '50s, the railroad company by his failure thereby, acquired the full 200 foot charter width.

Mr. Mitchell:

Q. What charter is that you are talking about?

A. I am speaking of the charter of the Western, North Carolina R. R. and practically all of the railroads which comprised what is now the Southern Railway system.

Q. What do those charters in Tennessee and Virginia and elsewhere have to do with the Memphis & Charleston Railway?

A. I was picking those in answer to your question, as to the general width of right of ways acquired over your system.

Q. Whose case is this anyway, Southern Railway or Memphis & Charleston Railway?

A. Memphis & Charleston Railway Company.

Witness dismissed.

C. N. Freeman, being first duly sworn, testified as follows on behalf of the complainant:

Direct examination by Mr. Hyde:

Q. Mr. Freeman, state your age and present residence?

A. 48, Atlanta, Ga.

Q. What position, if any, do you now occupy with the [fol. 156] Southern Railway Company and its affiliated lines.

A. Tax Agent.

Q. Do you act as Tax Agent in making returns for the taxation of Memphis & Charleston Railway Co., in the State of Mississippi?

A. I do.

Q. In that connection do you work considerably with figures and statistics?

A. Quite a good deal, yes, sir.

Q. How long have you occupied your present position, Mr. Freeman?

A. As Tax Agent, since April 1916, and in connection with tax matters for more than twenty-three years.

Q. For the railroad and its affiliated companies?

A. My connection with the Southern Railway Co., and its affiliated lines, has covered a period of more than 25 years.

Q. Mr. Freeman, I show you a paper and will get you to state in the evidence please, whether you prepared that paper?

A. Yes, sir, I prepared this, or supervised the preparation.

Q. Referring to this paper, which is proposed to be introduced as an exhibit to your testimony, I will get you to state what the first column indicates thereon?

A. That represents the amended valuation of all properties in Tishomingo County, as taken from the records in the office of the Chancery Clerk, of Tishomingo County, as of February 1st, 1926.

Q. Now the various items included under that caption of that column, as to that, state whether or not they are the figures which Mr. Bullen gave this morning, for the county and the various sub-divisions indicated?

[fol. 157] A. According to my understanding, they are identical to the figures which he gave this morning for the respective subdivisions.

Q. With reference to the second column, indicated, "Bond Issue" state what the figures in that column represented?

A. That represents in the Sub-divisions, opposite which I represent "Bond Issue": items, are shown for the amount of bonds issued, as of the dates indicated.

Q. State whether or not those figures in the second column headed, "Bond Issue," and the dates shown in the third column, headed "date," are the figures or not, that Mr. Bullen testified about this morning?

A. They are and they were taken from the records in the office of the Chancery Clerk.

Q. Now please take this paper, Mr. Freeman, and let me know, or state from the record, what percentage of the total assessed valuation of Tishomingo County, as of February 1st, 1926, the bond issue of $300,000, date September 1st, 1924, is?

Defendants interposed a specific objection to this testimony, as tending to show a bonded indebtedness excessive of a statutory limits in a collateral attack on a bond issue, and the taxing power, itself, being estopped to deny that the recitals in the bonds are true and correct.

Court reserved ruling.

Defendants also want a general objection.

Which was also heard under a reserved ruling.

Q. Will you state what the per cent is?

A. 7.148%.

[fol. 158] Q. Will you state, with reference to the other subdivisions listed and the bond issues pertaining respectfully to those subdivisions, state whether or not the paper you hold, shows worked out in the fourth column, the correct percentage thereof?

A. It does.

Q. With reference to the fifth column, headed "Remarks," I notice the words, "R. & B.," opposite the place in tabulation devoted to Tishomingo County. Explain that notation?

A. That signifys, as indicated from the records in the Chancery Clerk's office, that particular issue was an issue of bonds for Bridge and Railroad purposes.

Q. Going down the paper, I notice in the column of "Remarks," at the bottom of that column, the figures, 26.481%. State what that represents, Mr. Freeman?

A. That represents the percentage that the sum of all bond issues, apportionable to Oldham District bears to the total assessed valuation in Oldham District.

Q. Will you please file this paper as Exhibit "A" to your testimony?

A. I will.

See Exhibit "A," which is as follows:

EXHIBIT "A", C. N. FREEMAN

B. division	Total valuation as of Feb. 1st, 1926	Bond issue	Date	% bonds to valuation	Remarks
Tishomingo County.....	1,196,193	300,000	9/ 1/24	7.148	R. & B.
Super. Dist.....	1,249,516	35,000	12/15/11	2.801	
		79,000	10/ 1/19	6.322	
		9,000	10/ 1/19	0.720	
Highway Dist.....	1,932,481	100,000	10/ 1/12	5.908	
Oldham Rd. Dist.....	181,446	6,500	2/ 1/26	3.582	26.481%
Snowdown Sch. Dist.....	251,241	3,500	7/ 2/23	1.393	

[fol. 159] Q. Mr. Freeman, I show you Exhibit "F" to Mr. Bullen's testimony, which has been identified as a copy of the assessment headed, "Done by the State Tax Commission," as the assessment against the Memphis & Charleston Railway Co., as of date February 1st, 1926. Does that correctly represent the assessment, according to the records in this County and also according to the railroads records?

A. Yes, sir, it does.

Q. What does the assessment against the railroad consist of, or what does the paper show was considered in assessing the values against the railroad property in Tishomingo County?

A. Well, that is a valuation of $35,000.00 per mile, as applied against main track. That figure includes, not alone, the main track; that is to say the road bed, rights of way and superstructures thereon, but it includes the value of way lands, station grounds, yards, road bed, rolling stock, bridges, block system, telephone and telegraph lines and franchises. In addition to that, there are other properties included here, to-wit: side tracks, specially assessed at a valuation of $4,500 per mile, real estate, represents particular items of real estate outside of rights of way, areas proper and still a final column showing a valuation

of all other properties, that constitute general improvements upon rights of way, and minor items of personal property, such as section tools, or other equipment of that general nature and character.

Q. Who makes in Mississippi, or who made during the year 1926, the assessment against the Memphis & Charleston Railway Co.?

A. The State Tax Commission.

Q. State whether or not, you make for the Memphis & Charleston Railway Co., and the other component lines, [fol. 160] which makes up the Southern Railway system, operating in Mississippi, returns or information as is required by law, and on the forms furnished to the railroad by the State Tax Commission?

A. We do; a separate and distinct return for each particular corporation.

Q. State whether or not you know how much of the assessment of $35,000 per mile, is assessed with reference to the value of the physical tracks and other component parts of the physical property, and how much is assessed for rolling stock and franchise values, to the said State Tax Commission and state whether or not there has been disclosure by the State Tax Commission, any apportionment between those two classes of property?

A. There has not.

Q. Again referring to that statement, Exhibit "F" to Mr. Bullen's testimony, please state how much of the Railroad property was assessed for the year in question in the County as a whole?

A. 629,065.

Q. What is the assessment of the railroad property included within the First Supervisors District?

A. 373,235.

Q. What is the value of the assessment of the Railway Company's property for the year, within the Lee Highway District?

A. 629,065.

Q. I note that is indicated in the assessment in the county, state why that is, if you know, Mr. Freeman?

A. The first year, I don't recall now just which years, first year we were advised of the creation of the Lee Highway District. We were advised at that time by our at-

torney representing us in this territory that our entire [fol. 161] properties within Tishomingo County, were within the Lee Highway District. We had no knowledge in that particular case, of the formation of the road district until we received a demand for the taxes from the Sheriff and Tax Collector. We accepted, as correct, the advice of our attorney at that time. I might add in that connection, that our usual procedure in such cases, is to have check made by the Engineering Department.

Q. I was coming to that in a minute. You do find now from your investigations, that all of the property of the Railroad Company in Tishomingo County, is likewise within the Lee Highway District, do you?

A. As stated in the record, yes, sir, on previous answer.

Q. Again referring to Exhibit F to Mr. Bullen's testimony before you, state what the assessment against the Railway Company's property within the Oldham Road District is?

A. $113,200.

Q. I will get you to state, handing you a paper, whether or not you have prepared that paper?

A. This paper was either prepared by me or under my immediate supervision.

Q. With reference to that, state whether or not the first column thereon, includes the assessed valuations for the county and the various subdivisions which we have described?

A. It does.

Q. State what the second column represents?

A. The second column represents the assessed valuation, as fixed by the State Tax Commission in and for the respective jurisdictions on the property of the Memphis & Charleston Railway Co.

[fol. 162] Q. State what the third column represents?

A. The third column represents the ratio the assessed valuation of properties of the Memphis & Charleston Railway bears to the assessed valuation of all properties in the respective jurisdictions.

Q. When you say "ratio," is that the same as in per cent?

A. That means the per cent one bears to the other.

Q. I note on the bottom of the paper, a further tabulation and I will get you to state what that is, where you got those figures?

A. They represent by classes, the aggregate valuation, as assessed for the fiscal year 1926, as of February 1st of that year, covering different classes of properties including realty, personalty, Memphis & Charleston Railway Co., and other corporations within Oldham Road District.

Q. Those figures were taken——

A. From the records in the office of the Chancery Clerk.

Q. From the records, and were the figures which were testified to by Mr. Bullen this morning?

A. They are.

Q. Please file this paper as Exhibit "B" to your testimony?

A. I will.

EXHIBIT "B" TO TESTIMONY OF N. C. FREEMAN

[fol. 163] Subdivision	Total valuation as of Feb. 1st, 1926	Valuation M. & C. Ry. Feb. 1st, 1926	Ratio M. & C. to whole	Remarks
Tishomingo Co.	4,196,193	629,065	14.99	
1st Supers. District	1,692,481	373,235	27.87	
Lee Highway District	1,692,481	629,065	37.16	
Oldham Road District	181,448	113,200	62.39	

Oldham Road District

Item	Assessed value
Realty	26,730
Personalty	35,070
M. & C. Ry. Co.	113,200
S. E. Exp.	115
W. U. Tel. Co.	1,556
Cumb. Tel. & Tel. Co.	1,958
Pullman Co.	1,219
A. T. & T. Co.	1,400
Total	181,448

Q. Referring to the paper which you have just filed as Exhibit "B" to your testimony, Mr. Evans, I will get you to state what percentage of the total tax during the year [fol. 164] 1926, the M. & C. Railway Co., is assessed within the Oldham Road District?

A. 62.39%.

Q. Mr. Freeman, I will get you to state whether or not you have examined the personal roll for the year 1926 of Tishomingo County with reference to the returns of per-

sonal property made by Tax parties within the Oldham Road District?

A. I have.

Q. State whether or not from your examination of that book, which has been placed in evidence by Mr. Bullen, there are any returns of intangible or franchise values noted thereon and officially assessed for that year?

Mr. Magruder: We object to that on the ground that assessment roll is a conclusive adjudication as to the proper amount of the assessment against the various individuals as against their property and certainly the complainant cannot be heard to object to assessment against other corporations or individuals and in any event all of these assessments, both that of the railroad company on these schedules and are res adjudicata.

Court reserved ruling.

A. I found out of a total of 24 items, one item alone, in which there was an assessment of "interest bearing debt" carrying a rate of more than 6% on $150.00 only.

Q. State whether or not any of the other corporations within the Oldham Road District, were, from your examination of the assessment roll, assessed for franchises, going concerns or any other intangible value so far as your examination of the records show?

A. They do not. I noted particularly the Allen Gravel Co., they carry no such assessments.

Q. Mr. Freeman, referring to the tax rates, as shown by [fol. 165] an Exhibit introduced this morning, Exhibit "A" to Mr. Bullen's testimony, I will get you to state with reference to the Oldham Road District, rate of taxation, whether or not that is more or less than other Districts comprised within the First Supervisors District of Tishomingo County?

A. It carries the highest rate of any sub-division in the entire Supervisor's District.

Q. Mr. Freeman, it has been testified in this record, that the acreage of the M. & C. Ry. Co., within the Oldham Road District, is 57.79 acres. Assuming that the entire district comprises 2,950 acres, state the amount of the remaining acreage exclusive of the Railroad within the Oldham District.

A. All other acreage within the District, 2,892.21 acres.

Q. Assuming that the entire valuation of all properties as assessed within the Oldham District, is $181,446, and that the assessment against the Railway Co., is $113,200, state what the assessed valuation of all other property, exclusive of the Railroad's property in the District is?

A. $68,246.

Q. I will get you to state what the rate of assessment, as acreage alone, the Railway Company's property bears for the year in question?

Defendants object to that on the basis there is no provision under the laws of the State of Mississippi, for the assessment of Railroad property bears on acreage only, but on valuation of property.

Court reserved ruling.

A. $1,958.81 per acre.

Q. Assuming Mr. Freeman, that the other acreage within the District, that is, 2,982.21 acres, bore as real estate, the [fol. 166] entire remaining assessment within the District, what would the assessment against the other acreage be per acre?

A. Well, again correcting you, because you again state the acreage wrong, which is 2,892.21 acres, the value per acre would be $23.59.

Q. How much more per acre, based on that assumption, are the Railroad's land per acre, assessed at, than other lands within the District?

A. The value of the Railroad acreage is 83 times that of all other acreage.

Q. Now Mr. Freeman, I understand you to say that it was within the province of your Department with the Railroad, to make these returns to the State Tax Commission, upon which they base or consider, in basing their assessment of Railroad property within the State and within Tishomingo County?

A. It is, and we are charged with the whole responsibility.

Q. State approximately when you made that return for the M. & C. Railway Co., for the year 1926?

A. We made it on or about April 1st, 1926. I can't answer the question exactly. The law requires the returns to be made prior to the 1st Monday in April.

Q. Well, state when your Department furnished information to the State Tax Commission, showing the apportionment of the line and other physical property located within the Oldham Road District?

A. The information in the form of statement return, was mailed from our office on July 23rd, 1926, my recollection.

Q. State whether or not the M. & C. Railway Co., protested against the amount of the assessment against it, of property within the Oldham Road District?

A. Not specifically as such, only general.

[fol. 167] Defendants objected to any protest specific or general, because evidently it must have been a written protest.

Court reserved ruling.

Q. Explain what you mean by a protest in general, Mr. Freeman?

A. I mean by that we never make a protest specifically with reference to the formation of a local District over which the State Tax Commission, as such, has no jurisdiction.

Q. State whether or not you did file a protest and had a hearing regarding your general assessment for the M. & C. Railway Co.?

A. We did.

Q. And the State Tax Commission finally made the assessment resulting in the sheet which you have testified about this morning?

A. Yes, sir; having adopted as final, its tentative assessments.

Q. Mr. Freeman, have you figured the percentage of the assessment of the Railroad within the Snowdown School District, as compared with the total assessment of property within that District?

A. Yes, sir, I made the calculations. You want me to state?

Q. Please state what they are?

A. The Railroad's valuation represents 64.857 per cent of the total assessed valuation within the District.

Q. That is the Snowdown School District?

A. Snowdown Consolidated School District.

Cross-examination by Mr. Magruder:

Q. Mr. Freeman, where do you live?

A. Atlanta, Ga.

Q. And what is your exact position; Tax Commissioner, is that it?

A. Have been,—tax agent, my exact title.

[fol. 168] Q. Have you been over the territory of the Oldham Road District in Person?

A. No, sir.

Q. Have you ever been in it, except perhaps passing through on a train?

A. No, sir, I have not. To the best of my recollection, I have never passed through it—yes I did, enroute coming up here on this trip; something like 3 o'clock in the morning.

Q. In the berth of a Pullman car?

A. Berth of a Pullman car.

Q. You know any of the residents of that district?

A. No, sir, I can't say that I do.

Q. You don't know of course, under those circumstances, the values of any land in that District, do you?

A. Personally, I do not.

Q. You say that one citizen on the personal roll, is assessed with $150,00 of money, loaned at a rate of interest in excess of 6%, if I understand you correctly?

A. According to the records, yes, sir.

Q. That man, I believe, happens to be Mr. F. C. Chester, if you remember his name?

A. Since you mentioned it, I believe you are correct, sir.

Q. How much money did Mr. Chester have loaned out on the 1st day of February 1926, in excess of 6 per cent.

A. The records show he had taxable interest bearing paper to the extent of $150,00. That is all I can answer.

Q. You have no information otherwise?

A. No, sir.

Q. You therefore do not undertake to tell the Court that assessment is wrong?

[fol. 169] A. I only undertake to say what I personally found the records to indicate.

Q. In other words, you do not know anything about Mr. Chester's assessment or the propriety of it, except what the roll shows?

A. I have answered it in stating what the record shows.

Q. Now, that personal roll shows that the Allen Gravel Co., I believe it is, is assessed for the total amount of $15,600. You of course, do not know anything about that assessment, except what the record shows; whether right or wrong, do you?

A. You are correct, sir.

Q. And do not undertake to tell the Court whether that assessment is incorrectly or improperly assessed, do you?

A. Do not.

Q. The Memphis Stone & Gravel Co., is assessed at $15,000 on the personal roll. You do not undertake to say that assessment is wrong do you?

A. I do not, sir.

Q. Can you or do you undertake to point out to the Court a single assessment of farm property or any other property in the Oldham Road District that is not correct?

A. I do not. I do not undertake to state either correct or incorrect. I have my own notions if you want to know about it; about the relative values.

Q. Do you know, or can you designate to the Court, any territory that was excluded in the organization of the Oldham Road District, which ought, in your opinion, to have been included?

A. No, sir, I cannot.

Q. You were asked by Mr. Hyde, as to whether or not there were any assessments in the Oldham Road District against franchises other than the assessment by the State [fol. 170] Tax Commission, against complainant. Now then I will ask you if you know of any individuals or corporations in that District that has or enjoys any franchises?

A. Personally I do not. I would say this, that undoubtedly the two Gravel Companies, which we have named, have a franchise. Whether they be of any value I cannot say with the facts before me. They would not exist if they did not have a franchise in contemplation of the law.

Q. Do you use the word "franchise," just to be clear about it, in the sense of a charter?

A. I use the word "franchise" with the general acceptance of the meaning of that term. If we had a Dictionary we might be a little more specific.

Q. Do you know whether those concerns are corporations or whether partnerships, or whether a matter of individual ownership?

A. I do not know. I have naturally assumed they were corporations.

Q. Then in whatever sense you use the word "franchise," and under your assumption that they are corporations, you would simply mean then that they are not assessed on any franchise right in the sense of a charter, if I get you correctly?

A. I just do not understand your question. I will answer your question more definitely. In that sense I say I did not mean franchise, I mean more particularly, the right to exist or the right to be on one hand the right to do, to function, on the other. I believe franchise has two different meanings.

Q. Do you know of any franchise that either one of those companies, whether a corporation or partners or individual [fol. 171] ownership, enjoys, from the State or anybody else, subject to taxation, and which is not assessed for taxation?

A. The question is not entirely clear to me. I do not understand a partnership would have a franchise.

Q. Question was reread to witness?

A. I wish you would re-state the question; I do not entirely get your purport of it.

Mr. Cunningham: In other words, do you know of any charter running around out there not assessed?

A. The records do not show any franchise against any of those corporations, if corporations they be. I will qualify that statement.

Q. You therefore, do not know whether they are corporations or not and do not know whether they have any franchise rights or not?

A. I do not, of my own knowledge.

Q. Those farmers out there in that district, of course, you know as a matter of fact, don't take any franchise to farm?

A. Perfectly true, but they may have intangible properties.

Q. All right, if you know of any intangible property?

A. I do not, only what the records show; I do not know what they got.

Q. Now, you have introduced and identified here as Exhibit "A" to your testimony, I think you prepared that?

A. Either prepared or under my immediate supervision, yes, sir.

Q. In the last column here, "remarks", you have figured out opposite the line for the Oldham Road District, statement of percentage, 26.481. You get that, as I understand, from adding the total percentage of bonds, true valuations on all of these bonds on this list, except Snowdown School District, if I understand you correctly; is that cor-
[fol. 172] rect?

A. That is correct, sir.

Q. It is merely a matter of arithmetic, adding up those percentages in the aggregate?

A. As far as percentage goes.

Q. Snowdown School District on a lower line not included in that?

A. No, sir.

Q. Therefore that calculation includes the entire bond issue of $300,000 issued by Tishomingo County on Sept. 1st, 1924, and three issues by 1st Supervisors District at various dates, $35,000, and $7,900 and $9,000 respectively, and also the issue of $100,000 by the Lee Highway District, and also the issue of $6,500 by the Oldham Road District, which is involved in this litigation. That is correct,—I believe is it, Mr. Freeman?

A. That is correct, sir.

Q. Speaking of this Lee Highway District, you say that you were, if I understand you correctly, Mr. Freeman, that you were informed by your local counsel, or your Division Counsel, as the case may be, of the organization of the Lee Highway District and of the territory that is embraced?

A. No, sir, I did not say that.

Q. I do not mean to confuse you, or mis-quote you?

A. You do not confuse me.

Q. What did I understand you to say about your notification?

A. I said we had no knowledge of the formation of this District until we had a demand for the taxes for the benefit of the Lee Highway, and then we took the question up with our Attorney, with the late J. M. Boone. He advised us, as far as our property was concerned, the Lee Highway District embraced all property in Tishomingo County. I
[fol. 173] went on to explain only for what it was worth, that was little out of our usual procedure; our usual pro-

cedure was to have our Engineering Department, under our jurisdiction, to make out the check, but Mr. Boone was so familiar with the entire territory, we accepted his statement and we have so treated it as having been the Lee Highway District from year to year.

Q. Has that information been corrected?

A. We never have investigated it; investigated that particular District.

Q. What was Mr. Boone's position with that railroad?

A. He was division counsel.

Q. Who succeeded Mr. Boone and who is serving in that capacity now?

A. I believe Mr. Mitchell succeeded Mr. Boone. I do not know whether we had any other Attorney in the interim or not, do not think so.

Q. With reference to this Oldham Road District; by whom were you informed of the organization of that District?

A. By the State Tax Commission, through its Secretary.

Q. Have you got that notice with you, or a copy of it?

A. I think so; I will try to produce it.

Q. Wish you would be kind enough to do, Mr. Freeman, please?

A. All right, sir.

(Witness produces paper.)

Q. All right?

A. You want the letter read now, heading of the letter and everything?

Q. I do not care anything about the heading.

A. Letter on Letter head of State Tax Commission, Jackson, Miss., June 2, 1926 (it is addressed to no one in particular, so far as this record shows here; it is in the form of a circular letter).

[fol. 174] Mr. Hyde: Just put in exactly as addressed.

A. I can swear it was addressed to me.

(Witness reading:)

"Dear Sir: We are enclosing herewith, description of certain road and School Districts; some of these are new districts; some of them are districts created one or more years ago; but just reported to this office.

"Please acknowledge receipt of these descriptions, and if you own no property in the District, please advise us and return the descriptions, and if you do have property in the District, please let us know about when you can furnish us an assessment covering same.

"With best wishes, I am,

Yours very sincerely, (Signed) A. S. Coody, Sec."

Now description or enclosure:

"Description of the territory embraced in the Oldham Road District, in Tishomingo County, Mississippi, created Feb. 1st, 1926."

Mr. Hyde: We admit we got the property description and Counsel for Defendants, stated they did not care for it going into the record.

Mr. Magruder:

Q. Now that letter, or information from the State Tax Commission, if I understand you, Mr. Freeman, came to your Department, direct from the State Tax Commission?

A. Yes, sir, and most likely addressed specifically to the Tax Commission, I mean by that, the envelope was so addressed.

Q. Now then any previous communications from the Legal Department of the Company, would that have gone to the Tax Commission, or the Legal Department of the Company; what is their rule about that, if they had any? [fol. 175] A. Well, I cannot answer your question definitely, sir.

Q. Well, I understand, do I, that was your first information of the Oldham Road District, that letter?

A. It was.

Q. And you had no previous report whatever, as to the organization of the District or anything in connection with it, until that letter came from the State Tax Commission?

A. Not from any source whatsoever.

Q. Now then on the 23rd day of July, 1926, I believe you made your report to the State of Mississippi for taxation in Tishomingo County?

A. No, sir, not in Tishomingo County.

Q. Well in the State of Mississippi?

A. No; I am answering you correctly and your question.

Q. All right, then I will clear it up. What report did you make on the 23rd day of July, 1926?

A. Made a report covering mileage of property within Oldham Road District in Tishomingo County, Mississippi.

Q. All right, have you got a copy of that report with you, Mr. Freeman?

A. I think so, sir.

Q. Read it into the record, please sir; not tear up your record, I do not want to ask you to do that.

A. It is a letter.

"Memphis & Charleston Ry. Co., Atlanta, Ga.

July 23rd, 1926.

"Mr. A. S. Coody, Sec. State Tax Commission, Jackson, Miss.

"Dear Sir: As requested in your letter of June 2nd, to [fol. 176] forward statement of this Company's property in Oldham Road District, Tishomingo County, Mississippi, as of February 1st, 1926.

"Oldham Road District lies within Supervisor's Road District No. 1, but does not include all the property in that District. I have therefore prepared a statement so as to show a revised statement of the property in Supervisors' Road District No. 1, subdivided between property in Oldham Road District, and property outside Oldham Road District. The copies of our 1926 return, which you have, should be corrected accordingly.

(Signature:) Haden Johnson, Tax Commissioner."

Now that statement referred to:

"Statement of Property of the M. & C. Railway Co., Including Property in the Oldham Road District, Tishomingo County, Mississippi, as of February 1st, 1926"

Now we have a general heading, relative to the whole:

Supervisors' Road District No. 1, in Oldham Road District

Mile, 432 acres	$4,600.00
Gravel Siding	6,235.00
Mile, 431.8 acres	120.00
Mile, 434.2 acres	100.00
2.88 miles of line at $25,000	72,000
	$83,055

Outside Oldham Road District

Mile, 431.3 acres	$4,800	
Town of Iuka	47,385.00	
Mile, 437.9 acres	260.00	
5.45 miles of line at $25,000	136,250	
		188,695
Total		271,750

[fol. 177] Q. Now, then, Mr. Freeman, in this letter addressed to you or to your Company, by the State Tax Commission, on June 2nd, 1926, this statement, I believe is submitted to you:

"If you do have property in the District, please let us know about when you can furnish us an assessment covering same."

That is correct, I believe?

A. That is my understanding. The letter speaks for itself, read into the record.

Q. In response to that, you sent this statement, which you have just read into the record, or your Department, on the 23rd day of July, 1926?

A. Yes, sir.

Q. What protest, if any, did you make to the State Tax Commission against this inquiry or suggestion about the assessment in the Oldham Road District?

A. It is not our habit to make protest concerning matters over which the State Tax Commission has no jurisdiction, and we made none, sir.

Q. When and to whom did you make first formal or official protest against the organization of Oldham Road District?

A. I refer you to our Attorneys in answer to that.

Q. Your Attorneys not being on the witness stand, and you being on the witness stand, Mr. Freeman, I'll ask you to state to the Court when and to whom did you make your first protest to the organization of the Oldham Road District?

A. In as much as our records do not disclose any protest, except by the petition for an injunction, since that was handled by our Attorneys exclusively, I am unable to answer the question definitely.

Q. So far as your Department is concerned, you do not [fol. 178] know or undertake to tell the Court, you do not know of any protest being made before this injunction bill was filed on the 13th day of July, 1927?

A. I do not know.

Q. Mr. Freeman, your Company did not pay any taxes in the Oldham Road District for the year 1926 did you?

A. No, sir.

Q. Never have paid any have you?

A. No, sir.

Q. Who issues vouchers for taxes, you recollect?

A. All vouchers covering ad valorem property taxes, originate in our office. To clarify it, I might state this, that all taxes, we are charged with the responsibility of vouching for all taxes, rather than Federal and State income taxes.

Q. Including taxes against specific road districts?

A. I think my statement covers it.

Q. Well you could then as an additional statement make your statement to cover special road districts?

A. I mean assessments against us, yes, sir.

Q. You paid your other taxes to Tishomingo County, including the Lee Highway District, probably in the month of December or January, did you Mr. Freeman?

A. Possibly in January 1927.

Q. Any protest made to the Tax Collector at that time at all, or any explanation given as to why the taxes were not paid in the Oldham Road District?

A. In such cases our vouchers usually carry a statement generally, to the effect it does not purport to pay taxes in question and in that particular case, I think our voucher carries same to that effect.

Q. Got a copy of that voucher with you?

[fol. 179] A. I think so.

Q. Let us have it please sir?

A. I will read it into the record.

Q. I will just put this into the record so as to clear it up. "Now, Mr. Freeman, having submitted to the defendants' attorneys, a copy or duplicate of the original tax voucher, or a carbon copy, I now ask you to state to the Court, the date that this carbon copy bears?

A. January 8th, 1927.

Q. I will ask you to read the last paragraph in the voucher, omitting all technical corrections, which are of no effect to this case?

A. This voucher does not purport to pay taxes for the benefit of Oldham Road District, as follows: "Assessment, $113,200; rate, 0.40 cents on the $100.00; taxes, $4,520.80—because believed to be illegal."

Q. Now then in that voucher, you included and paid all taxes assessed against your Company, for the Lee Highway District in Tishomingo County, did you not?

A. Yes, sir.

Q. Mr. Freeman, I see that you have here considerable file of papers from which you have kindly read copies into the record, and if I understand you correctly, you say that no report was made to your Department from any source, prior to the letter of June 2nd, 1926, from the Secretary of the State Tax Commission. Now have you in your files any report or data, giving, not only your Department, but any other Department of the railroad company, any information about the organization of this District prior to the 2nd of July, 1926?

A. Absolutely none, sir.

[fol. 180] Redirect examination by Mr. Hyde:

Q. Mr. Freeman, have you examined the Register of Bonds, book of Tishomingo County, which Mr. Bullen introduced in evidence this morning, with reference to the amount of bonds retired in the various bond issues, which have been referred to in this record?

A. I have.

Q. Have you got a memorandum that you have made up from that?

A. I think I can remember each one of that matter.

Q. Is that the memorandum you made from the book in question?

A. Yes, sir.

Q. With reference to the first book issue of $300.00 of Tishomingo County, for road and bridge bonds, state how many of them are shown to have been retired?

A. Prior to February 1st, 1926?

Q. Yes, sir?

A. $6,000.

Q. How much of the next *cond* issue?

A. First Supervisor's District?

Q. Yes, sir, of 35,000?

A. Shows $200 of those bonds had been retired, aggregating $2,000.

Q. Of the issue of $79,000, how many have been retired?

A. None.

Q. 9,000?

A. None.

Q. Of the Lee Highway, $100,000 bond issue, how many of them or how much in the aggregate have been retired by this date?

A. 6,000.

Q. The Oldham Road District of $6,500?

A. Those bonds were issued as of February 1st, 1926.

Q. So *fo* course, there could not have been any retire-

[fol. 181] ment as of that date?

A. No, sir.

Q. Have you re-calculated the percentage of the total assessment, assessed valuation of the outstanding bonds of those issues of February 1st, 1926?

A. I have.

Q. Will you please read into the record those respective percentages?

A. The issue of $294,000 of road and bridge bonds, Tishomingo County, outstanding on February 1st, 1926, the percentage of bonds, to total assessed valuation, is 7,006%. Of the original $35,000 issue of road bonds in First Supervisors District, of which $33,000 were outstanding on February 1st, 1926, the percentage of bonds to assessed valuation, is 2,641%. Of the $79,000 and the $9,000 issues, road bonds 1st Supervisors District, none having been retired, the respective percentages remain the same, to-wit: 6.322%, and 0.720% of the original issue of $100,000 road bonds for Lee Highway Road District, $94,000 were outstanding on Feb. 1st. 1926, reducing the percentage thereby to 5.554%. The entire issue of $6,500 Oldham Road District, issue as of Feb. 1st, 1926, being outstanding, the percentage remains the same, to-wit: 3,582%, the result of which, on all the issues above stated, which are fairly and properly apportionable to properties within Oldham Road District, respectively, 25.825% of the total assessed valuation of such properties in that Road District.

Defendants object to that part of Mr. Freeman's testimony in which he undertakes to say what percentage or [fol. 182] ratio of assessment is proper and reasonably taxed against the porperty of the Oldham Road District, on the ground that is not a matter of his opinion as to what is proper and reasonable, but is a matter of law.

Mr. Hyde: I think the objection is well taken, and I think the words "fairly and properly" might be stricken. You can make your explanation and then just give your answer, saying what percentage, what apportionable.

Q. Will you please file the memorandum from which you have read as Exhibit "C"?

A. I will.

Stenographer here marked paper as Exhibit "C", which is as follows:

EXHIBIT "C" TO TESTIMONY OF C. N. FREEMAN

Tishomingo County.....	.....	$4,196,493	$294,000	7.006%
1st Superv. Dist.....	$1,249,576	33,000	2.641%	
		79,000	6.322%	9.683%
		9,000	0.720%	
Lee Highway.....	1,692,481	94,000	.....	5.554%
Oldham Road District.....	141,496	6,500	.....	3.582%
				25.825%
Snowdown Cons. School.....	251,244	2,100	.....	1.836%

Q. Mr. Freeman, in the values which you place opposite [fol. 183] the property apportioned the Oldham Road District, in your letter of July 3rd, 1926, state on what basis those values were inserted in that report?

A. Those were the same until values which apply generally in our return values, with the State Tax Commission.

Q. So then the values apply, respectfully to proportional part of the values which you had originally returned, based on the physical separation of the property?

A. Correct.

Q. Were those figures for the Oldham Road District finally accepted by the State, or were the general values increased for both the County and Oldham Road District?

A. Were generally increased for main track until values and side track unit values.

Q. What was your return based on, as a value for your main track mileage in that year?

A. Upon our idea.

Q. In the amount I should have added: how much did you return per mile?

A. Oh, 25,000, for main track and $4,000 for the side track.

Q. What values respectlly, were finally furnished by the State Commission?

A. $35,000 for main track, and $4500 per mile for side track.

Recross-examination by Mr. Magruder:

Q. Well in any event, since it has come up about this report, have you got a report you made to the General State Tax Commission for the M. & C. Railway Co., for Tishomingo County, in 1926?

[fol. 184] A. Yes, sir.

Q. Mr. Freeman, will you let me see that?

Witness produces returns.

Q. Now Mr. Freeman, you have kindly submitted to us here, your report of the M. & C. Railway Co., dated February 1st, 1926, to the State Tax Commission. I will ask you to just read into the record the caption, three lines at the top of this report?

A. "Schedule or roll of Assessments of Memphis & Charleston Railway Company in Tishomingo County, State of Mississippi, for taxes due the Municipalities and Districts named below in said County, and due said County, as indicated below on property owned by said Company therein, on the first day of February, 1926, to-wit:

Q. Now I will ask you to read the last line at the bottom of this report into the record.

A. "First Main track includes value of waylands, station grounds, yards, road beds, bridges, rolling stock, block system, telephone and telegraph lines and franchise.

Q. Your report from which you have read these extracts, to the State Tax Commission, was made on forms furnished by them and accepted by you, as furnished by the State Tax Commission?

A. Yes, sir, they furnish these forms.

Q. And in the report you made to the State Tax Commission, from which you are reading these extracts, we have an exact duplicate of the Exhibit you introduced here in evidence, from the Sheriff's office, showing the assessment against your property in this County, accepted from the increased assessment made by the State Tax Commission, and for the fact that tax against the Oldham Road District has been imposed since the original preparation of this [fol. 185] paper or this report which you have in your hand. This is correct is it?

A. I think that is about correct.

Q. Now then these figures which you have written in since the original preparation of this paper, the taxes on the Oldham Road District that has been superimposed since the original preparation. Now when you first submitted this report for 1926, to the State Tax Commission, you submitted as against Oldham Road District, an assessment of 83,055?

A. No, sir, we do not. I stated this return was filed before we knew anything about the Oldham Road District. We filed a schedule on July 23rd, 1926,— In the statement which I read into the record, shows a value of 83,055.

Q. In making that report on July 23rd, 1926, you then superimposed or wrote into this copy retained by you, that original data obtained in the Oldham Road District?

A. Some clerk in my office, under my supervision wrote those figures.

Q. And it was written by the Clerk in your office on July 23rd, 1926, from the amount shown in that original report to the state Tax Commission, 83,055 wasn't it?

A. Seems so, yes, sir.

Q. Then at a later date, those figures were erased by running a line through them and the assessment made by the Tax Commission, was written just above that $113,000?

A. Yes, sir.

Q. Now then when that specific assessment was made in 1926, by the State Tax Commission, if I understand you correctly, no objection or protest whatever was made to the State Tax Commission; that is right, and no appeal was taken from it?

A. We made a protect to the Commission going to the assessment as a whole.

Q. No appeal was taken from that assessment in 1926, or any part of that, Oldham District or otherwise?

[fol. 186] A. Other than by general protesting to the assessment as a whole, none.

Witness dismissed.

AGREEMENT RE ORIGINAL PETITION

It is agreed that a correct copy of the original petition filed with the Board of Supervisors for the organization of Oldham Road District, may be supplied and made a part of this record later on.

OFFERS IN EVIDENCE

Complainant offered in evidence Chapter 277 of the laws of 1920, as follows:

Clerk here copy.

Chapter 277, Laws of 1920, Senate Bill No. 146

An act to amend Chapter 176 of the Laws of 1914 so as to provide the manner in which districts may be created and bonds issued; to increase the tax levy; to increase the percentum of bonds that may be issued; to provide how a district may be created of two or more original districts; to provide that this act shall only effect those roads selected as provided therein; to provide for the acquiring of rights of way for roads of greater width than thirty feet.

[fol. 187] Highways—Powers of Supervisors to Construct —Laws 1914 Amended

Hemingway's Code, Secs. 7158-7178

Section 1. Be it enacted by the Legislature of the State of Mississippi, That the Board of Supervisors of any county in this state are hereby authorized and empowered to construct, or construct and maintain, or maintain one or more highways for the convenience of the traveling public, by contracts in one or more supervisor's districts of said county, or part of one supervisor's districts in such county, and for that purpose are authorized to issue and sell bonds and to levy and to collect taxes to pay such bonds and to maintain such roads so constructed in the manner herein provided.

Road Districts—How Created under This Act

Section 2. That upon presentation to the board of Supervisors of any county of a petition containing the names of 20 per cent of the qualified electors of any one or more supervisors districts of any territory proposed to be created and organized into a road district of such county asking that such district or districts or territory be permitted to come under the provisions of this act it shall be

the duty of such board of Supervisors to order an election to be held on a day to be fixed by them submitting the proposal to issue bonds of such district or districts to the qualified electors of such district or districts and the election commissioners of such county, shall give notice of such election to issue such bonds by publication in a newspaper published in the county, having a general circulation therein, and if none be therein published, then in some newspaper having a general circulation therein, published else-where, for three successive weeks, which said election shall be held and be conducted according to the provisions of the chapter on "registration and elections" of the Code [fol. 188] of 1906, so far as applicable; the tickets to be used in such election to contain the following: "For the issuance of Bonds," and either below or above it, in the ticket, "Against the issuance of bonds,"

General Laws of the Supervisors to Ascertain and Declare Result of Election

Section 3. That the returns of such election shall be canvassed by the election commissioners of the county, and the result certified by the commissioners to the Board of Supervisors at their next regular meeting; and should the result of such election show that it has carried in favor of the issuance of bonds by a majority vote of those participating therein, then it shall be the duty of the Board of Supervisors to issue the bonds of such Supervisors' district or districts, in any amount not to exceed fifteen per centum provided in no county or district shall bonds in excess of 15% per cent of the assessed valuation ever be issued of the assessed value of all the taxable property of such district, or districts, the amount within this limit to be fixed by the commissioners hereinafter provided for, subject to the approval of the board of Supervisors, and such bonds to be issued and sold either all at one time or in installments from time to time as funds are needed for the construction of such highways or highway, in the discretion of such commissioners and the board of Supervisors. That any county or supervisors district or part of supervisors district or districts which have heretofore issued bonds in said county, Supervisor's district or parts of supervisor's district or

districts to an amount of ten per cent of the assessed valuation of said county, Supervisors' district or parts of Supervisors' district or districts, may, under the provisions of this act and in pursuance thereof, issue bonds in addition to those already issued if bonds have heretofore been issued [fol. 189] to an amount of ten per cent of the said assessed valuation to an amount not in excess of five per cent of the assessed valuation of said county, supervisors' district or parts of Supervisors' district or districts.

Bonds Authorized—How Payable—Interest and Maturity

Section 4. That the bonds issued under authority of this act shall mature not later than twenty-five years from the date of their issuance, and to bear interest at a rate not exceeding six per centum per annum, payable annually or semi-annually, as the Board of Supervisors shall direct; and shall be exempt from all taxes, and shall be payable in annual installments: the amount to be paid each year to be fixed by the Board of Supervisors when the bonds are issued and all such bonds with interest coupons attached shall be lithographed with suitable devices to prevent counterfeiting, and shall be in sums of one hundred or five hundred dollars each, and shall be registered by the clerk of the board of supervisors, in a book to be kept for that purpose, and be numbered in a regular series from one upward; and be signed by the President of the Board and countersigned by the clerk, who shall impress the seal of the county upon each bond as it is issued; but the coupons shall be lithographed with the fac simile signatures of the President and clerk of said board, and every such bond shall specify on its face the purpose of which it was authorized and the total amount authorized to be issued, and each bond shall be made payable to a person by name, the purchaser, followed by the words "or bearer", such bonds to be entitled "Road Bonds of —— County (naming the county"), or describing by name or number the territory created and organized into a road district under Section 2 of this act, supervisors' district (or districts if more than one) number — giving the number or numbers of the Supervisors' [fol. 190] district)" and such bonds shall not be sold for less than their face value; and the board of Supervisors of

each county shall levy annually a special tax upon all the taxable property of such district or districts to be used exclusively in paying the interest on such bonds, and providing a sinking fund for their redemption.

Highway Commission Created—Duties and Powers of Same

Section 5. That is shall be the duty of the board of Supervisors in case such election shall result in favor of the issuance of bonds, at their next regular meeting, or any subsequent meeting, appoint three commissioners, who shall be qualified electors of such district or districts and real estate owners therein, who shall hold office for a term of four years from the time of their appointment and until their successors are appointed by the Board of Supervisors, whose duty it shall be to have the management and supervision of the construction and maintenance of the roads built under the provisions of this act, subject to the approval of the board of Supervisors; and for their services shall be paid their actual expenses, not exceeding one hundred dollars each per annum; such commissioners may employ legal counsel if necessary and pay a reasonable compensation for the same; and it shall be the duty of such commissioners, subject to the approval of the Board of Supervisors to determine and fix what road or roads shall be constructed or constructed and maintained or maintained in such districts or district out of the proceeds of the sale of such bonds and the levy of such taxes; and it shall be their duty to let all contracts for the construction and maintenance or for the maintenance of such roads in the manner now provided by law for the letting of contracts for public work by the board of supervisors and it shall be their duty to employ a competent engineer to survey and lay out such [fol. 191] road or roads in such district or districts, as they shall determine upon, whose duty it shall be to make an estimate of the cost of constructing and maintaining such highway or highways for each separate mile covered by such survey, and report such survey and estimate to said commissioners before contracts are let for the construction or for the construction and maintenance of such highway or highways; which survey and estimate said commissioners shall have the power to adopt or reject and in the latter

event to have another made; and when adopted, it shall be their duty to report the same to the board of supervisors, whose duty it shall be to order the clerk of said board to file the same among the records of the office, and spread the same on the minutes of the board and make an order adopting such survey, and estimate so reported and adopted by such commissioners; all of which acts of said commissioners to be subject to the ratification or rejection by the board of supervisors.

Highways Established and Maintained—Special Tax Levied

Section 6. That the public highway or highways so surveyed and adopted by such commissioners shall be constructed and maintained out of the proceeds of such bonds; proceeds of such bonds to be used alone in their construction and maintenance, and the board of supervisors shall levy an annual tax, on the recommendation of such commissioners, on all the taxable property in such district or districts not exceeding three mills on the dollar, which shall be used to supplement the general fund of the county in maintaining said road or roads and the culverts, bridges, and levees thereon. And for the purpose of paying such bonds and interest thereon. And for the purpose of paying such bonds and interest and so maintaing said roads, the board of supervisors shall at the time fixed by law levy the tax for the same and it shall be the duty of the county auditor to keep a separate account of such funds so raised from the other funds of the county; and it shall be the duty [fol. 192] of the treasurer who shall be the treasurer of such funds and liable on his bond therefor, to keep a separate account thereof. And all allowances against said special fund shall be made by the board of supervisors on the recommendation of such commissioners and special warrants prepared for the purpose shall be issued against said funds.

Road May Be Extended Beyond the Limits of District—How

Section 7. That if the qualified electors, petitioning to come under the provisions of this act, as provided in sec-

tion 2 hereof, shall so desire, they may petition, in addition, that the proceeds of the sale of said bonds may be used to extend and build roads beyond the limits of such district or districts, and that a tax be levied on such district or districts to pay such bonds and maintain such roads, then it shall be the duty of the board, in publishing the notice of election to be held as provided for in section 2, to add thereto notice of the further purpose to use part of the proceeds of said bonds in building and maintaining roads in other district or districts; and to levy taxes for that purpose. The further question shall be submitted to the electors, whether such roads are to be so extended or not, which shall be submitted as follows: "For the extension of roads into other districts", or "Against the extension of roads into other districts". And if a majority of the electors voting in such election shall vote in the affirmative, then the said road commissioners shall, with the approval of the board of Supervisors have the power to extend said roads into other districts and pay for the same out of the proceeds of the sale of said bonds, and levy a tax to maintain the same on such district, or districts consenting thereto, as provided for in this act.

How New Territory Added to Road District

Section 8. Any portion of any district or districts, not [fol. 193] coming under the provisions of this act, may, by petition of twenty per cent of the qualified electors of such portion, join in the petition provided for in section 2 of this act, and ask to be incorporated into a road district with such district or districts petitioning under said section 2, which petition of such portion of other district, shall specifically and accurately define the additional territory to be added to such district or districts and thereupon notice shall be published as provided for in such said section 2, so as to cover such portions of other districts or district; and if an election results as provided in section 2, all the qualified electors residing in such district or districts, as well as such added portions of other districts, shall have the right to vote in such election, and if a majority participating in such election shall vote for the issuance of bonds, then the board of supervisors shall incorporate such district or districts

and added territory of other districts into a road district and all the other provisions of this act shall be applicable thereto.

Separate Assessment of District to be Made by Assessor

Section 9. That the tax assessor, when ordered so to do by the board of supervisors, shall make a separate assessment of all the taxable property of such district or districts or part of districts or territory forming a road district, and in making such assessment it shall not be necessary for him to reassess the property in such road district, but he shall copy from the assessment rolls in use at the time, or mark and separate thereon all the property and persons in such district or districts, or parts of districts forming a road district, so that the sheriff in collecting the taxes levied on such road district, may easily ascertain the property and persons situated thereon, and for his services [fol. 194] the board shall allow the assessor reasonable compensation for making such assessment.

Election in Added Territory—How Held

Section 10. That in any election held under the provisions of this act where other territory than such district or districts petitioning to join in such district or districts, in accordance with sections 8, of this act, the board of supervisors shall have the power to fix the place, and provide for holding the election by the qualified electors of such added territory.

How Existing Laws to Apply under This Act

Section 11. Nothing in this act shall be taken to repeal any road laws of the state. Counties working the public roads by contract, or that may hereafter do so, shall be authorized to levy and collect a road tax from the whole county, including the districts electing to come under this act. Such portion of the proceeds of said tax as would have been necessary to work the roads in such districts had they not so elected, shall be subject to the control of the commissioners of said district to be used therein. But the

districts separately taxed to pay principal and interest on bonds for building roads made of stone, gravel, chert, slag, or sand clay, or of a combination of such material, or any material equally durable shall not be subject to an additional tax for building such roads in other parts of the county or for the payment of principal and interest on any county bonds hereafter issued for road purposes, without the consent of a majority of the qualified electors of said district voting in an election held for that purpose.

In counties working convicts on the public roads, such convicts shall be worked as far as practicable in cutting down hills and reducing the grade of roads where they will not be subject to frequent and unnecessary removal from one place to another.

[fol. 195] How Public Roads to be Worked in Separate Districts

Section 12. That all the public roads of any district, or districts or parts of districts, in any county in this state, which have or may come under the operation of this act, shall be worked by contract, if the board of supervisors of such county shall so elect by an order entered to that effect on its minutes.

Road Hands—Assignment of—Commutation Tax—Penalty for Default, etc.

Section 13. That the hands designated by the board of supervisors shall work under the contractor, or pay the commutation tax to the tax collector of the county; but the person shall not be required to work on the road, under the contract, more than ten days in any one year; and every person liable under the contractor of the public roads, by paying to the tax collector of the county, on or before the 15th day of December, or before he may be assigned to work, the sum of $5.00; or, if he has been so assigned, and is warned to work, and before default, by paying to such tax collector the sum of $5.00 before default and such work shall be done and such commutation tax shall be paid, under the same penalties and subject to like warnings, and reported by the contractor, and a like proceeding before a justice of the peace, if required, to work under an overseer;

and in case a road hand shall work out his time with the contractor instead of paying the commutation tax, such contractor shall be charged by the board of supervisors with such a sum on his contract for such labor as may in advance be agreed on between such board and contractor. And the board of supervisors shall assign the road hands at the February meeting in each year, or as soon thereafter as practicable, and may at any meeting assign to work hands not assigned to work at said February meeting. It shall be the duty of the county auditor to keep a separate account of such funds so raised by commutation tax, from [fol. 196] other funds; and it shall be the duty of the treasurer of such funds and liable on his bond therefore, to keep a separate account thereof and all allowances against said special fund, shall be made by the Board of Supervisors on the recommendation made by such commissioners, and a special warrant prepared for the purpose, shall be issued against said funds.

Acceptance and Final Settlement—Detailed Statement of Expenditures

Section 14. That the roads hereinbefore provided for shall have been completed for a period of at least one month before the board of supervisors and the road commissioners shall finally accept the same and make final settlement therefor, nor shall the board of supervisors allow any payment to any contractor for the construction of any such road until an itemized statement shall be filed, showing in detail the amount that may be due for the preceding month for each separate mile, the number of yards hauled for each mile, and the amount of work completed for each mile.

Final Settlement with Engineer

Section 15. The board of supervisors shall retain fifteen per cent of the amount due the engineer employed under the provisions of this act until the road constructed under his supervisions shall have been finally accepted.

Purchase of Teams, Implements, etc., for Working Roads—Competitive Bids

Section 16. When the funds arising from the bonds sold under this act shall have been expended in the construction

of roads, and the contracts for construction of roads have been completed, then the road commissioners, by and with the consent of the board of supervisors are hereby authorized and empowered to purchase the teams, implements and material and employ labor and work said roads, and build bridges under the direction of a competent person to be [fol. 197] employed by said commissioners and may do all things necessary to be done to work, maintain and improve the roads and build bridges, as herein provided, but all contracts for material and supplies shall be made on and after competitive bids for the same, and all labor shall be employed by and under the direction of said commissioners, by and with the consent of the board of supervisors.

Assignment of Road Hands—Teams and Implements—Commutation Fee

Section 17. It shall be the duty of the board of supervisors to assign to said roads all persons, teams and implements liable to road duty under the laws of the state of Mississippi, who live on or near roads, and not assigned to some other road nearer to said hands, which said hands and teams and implements shall be liable to work of said roads, as is provided for roads generally; provided that each person liable to work on said road may pay a commutation tax of five dollars ($5.00) *and* for himself and two dollars ($2.00) for each head of stock liable to work on said roads, on or before the first day of February, each year, which said sum when paid shall be placed to the credit of the road whereon said person and team were liable to work.

Commissioner May Call Out Labor Liable for Road Duty

Section 18. Said commissioners are hereby authorized to call out for work on said roads all persons and teams and implements liable to work on said roads, which have not paid the commutation tax herein provided for, by written notice as required by law for other roads at any time when in their opinion work is needful on said roads, any person failing to appear when duly notified, or appearing and failing to do good and faithful work may be dealt with as is provided for by law for other road hands.

Repair of Roads and Bridges—Emergency Cases

Section 19. That the said commissioners maintaining the [fol. 198] roads under the preceding section in case of emergency may repair such roads and bridges and keep the same in a proper state of repair without waiting until due advertisement shall be made, provided however, that the amount so expended by them shall not in any one instance exceed the sum of two hundred and fifty dollars.

Supervisors to Build All Bridges in Certain Cases

Section 20. It shall be the duty of the board of supervisors out of the county fund to build all bridges in districts coming under this act the cost of which exceeds twenty-five dollars, and to keep the same in repair.

Section 21. That all the provisions of Chapter 123, Code of 1906, and amendments thereto, not in conflict with the provisions of this act so far as applicable shall govern the working of and maintaining of public road of such district or districts, or parts of districts so operating under this act.

Section 22. A separate road district may be created from two or more districts or parts of two or more districts heretofore or hereafter created in the same manner and with same powers as are herein provided for the original districts, but the creation of a district from two or more districts or parts of two or more districts shall not release the territory or taxable property or persons of the former districts from assessments for the benefit and purposes of the original districts, nor impair or in any wise release the property or persons in the new district so created from assessment and liability for the payment of the debts and obligations of the original districts; and the creation of such new district from two or more districts, or parts of districts already formed shall in no wise change the lines or territorial construction and integrity of the original districts from which such new district may be formed.

Section 23. That the provisions of this chapter shall not [fol. 199] apply to any road or roads except those selected by the commissioners, unless otherwise ordered by the board of supervisors.

Rights of Way—Supervisors May Acquire—Width of

Section 24. The board of supervisors are authorized to acquire rights of way for the roads proposed to be constructed in said district in the manner now prescribed by law for the acquisition of rights of way for roads, such right-of-way to be of necessary width and if it be deemed necessary to acquire rights of way for such roads in excess of thirty feet, then the board of supervisors is authorized to acquire same up to any width deemed by them to be necessary for such road.

Section 25. That this act take effect and be in force from and after its passage.

Approved March 26, 1920.

Complainant introduced in evidence Chapter 192 of Hemingway's Annotated Mississippi Code of 1927, of the duties of the Tax Commission with reference to taxation of Railroads, specially Sections 9359 and 9369.

It is agreed that Hemingway's Code of 1927, correctly contains the Code laws of Mississippi as of that date, together with the notations contained therein, showing the various acts of the Legislature from which the Code Sections are compiled.

(Clerk will here copy.)

[fol. 200] Section 9359, Hemingway's Code, 1927, Volume 2

To Provide Forms for Information

The State tax commission shall be, and they are hereby, authorized to prepare and furnish forms for obtaining the information hereinafter provided for whenever they may deem it necessary.

(A) Amount of fire insurance carried on all buildings and on personal property of every description.

(B) All individuals, firms, partnerships and corporations engaged wholly or in part in mercantile, manufacturing or any other business, (except banks and insurance companies) occupation or calling, shall, on demand by the state tax commission in writing furnish a sworn statement of their taxable property, as of February first of each year. Any person or concern failing or refusing to furnish the information required (within thirty days after written notice so to do, from the state tax commission) shall be guilty of a misdemeanor, and shall be reported to the grand jury by the tax assessor, at the instance of the state tax commission, and on conviction shall be punished as for a misdemeanor.

(Laws 1918, ch. 228. In effect March 27, 1918.)

[fol. 201] Section 9362, Hemingway's Code, 1927, Volume 2

Secretary of the State Tax Commission—Qualifications, Duties, and Powers Prescribed

There shall be a secretary of the state tax commission, to be appointed by the commission, and he shall have the same qualifications as the commissioners. He shall take the oath of office prescribed by section 268 of the constition, which shall be deposited with the secretary of state, accompanying his appointment by the commission; and he shall execute a bond payable to the state of Mississippi, to be approved by the governor, and filed with the secretary of state, in the penal sum of five thousand dollars, in some surety company authorized to do business in this state, for the faithful discharge of his duties, and the premium on said bond shall be paid by the state. He shall be removable from office at the pleasure of the commission, and it may fill any vacancy. It shall be the duty of the secretary of the state tax commission to keep the minutes of the commission, to keep in his official custody the real and personal assessment rolls, and the assessment rolls of public service corporations, and other books, records, documents and papers, except as otherwise provided by law, and perform such other duties as the commissioner may direct. He shall furnish certified copies of such records in his custody as are public, and as directed by the commission, ex-

cept as otherwise provided by law; he may administer oaths and take affidavits as to all matters officially before the commission and as to records, documents and papers to be filed with the commission; And in all hearings before the commission on income and inheritance tax matters, he shall keep the minutes of the commission, and make a record of all orders, findings and acts of the commission.

(Laws 1926, ch. 327. In effect February 17, 1926.)

[fol. 202] Section 9368 (77691), Hemingway's Code, 1927, Volume 2

State Tax Commission Assessors of Public Service Corporations

The members of the state tax commission are constituted state assessors of railroads and other public service corporations, and they shall, upon the receipt or making of the schedules hereinafter provided for, assess the property of railroads, telegraphs, telephone, sleeping car, express company and other public service corporations liable to taxation in the state, affixing its true value as that such property shall bear its just proportion of taxation, taking into consideration the value of the franchise, the capital stock engaged in the business in this state; and the state assessors of railroads and other public service corporations may adopt other and further rules necessary and proper to ascertain the value of property to be assessed by them, including the amount of capital engaged in the business in this state.

(Laws 1918, ch. 138. In effect March 26, 1918.)

Section 9369, Hemingway's Code, 1927, Volume 2

Schedule Required to be Filed

Each railroad company owning and operating a railroad, shall, on or before the first Monday in April, in each year, file with the state tax commission, a complete schedule, under oath, of all its property, real or personal, taxable and nontaxable, setting forth therein the length in miles or showing how many miles or fractions thereof, of its entire [fol. 203] road-bed, switches and side-tracks, and showing how many miles or fractions thereof lie in this state, and

each county of the state, and in each city, town, village, levee district, road district, and in each separate or consolidated school district, and where a separate school district is composed in part of the corporate limits of a city, town or village, and in part of separate, adjacent annexed territory, then in that event, what part of its road-bed, switches and sidetracks lie in such separate, adjacent annexed territory so constituting a part of such separate school district, and the value of the whole and each part thereof, as subdivided herein; the total amount of capital stock, its par value and its actual value, and the value of its franchise the number of engines and their respective values, the gross amount of receipts in the year preceding; the number of cars of all kinds, their class and value; the number of depot buildings and warehouses and other buildings; in what county, and city, town, village, levee district, road district or separate or consolidated school district, and the value of each, including the lands and lots upon which the same are built; the value of all machinery and car shops and stationary machinery and tools therein, and in what county and city, town, village, separate or consolidated school district, road district, or levee district located, including the lands upon which the same are built; all real, personal or mixed property belonging to the company within the state, not enumerated, with its value; the number of bridges and ferries, in this state, in what county and city, town, village, separate or consolidated school district, road district, or levee district located and the value of each, and specifying whether such value is or is not included in the value of the road-bed; a list of all lands in this state owned, describing the same and giving the location and value thereof, the quantity of land used for [fol. 204] depots and machine shops and its value aside from the buildings thereon; the gross amount of receipts the year preceding from passengers and freight separately, and the proportion thereof earned within and from this state; and if any of said property is claimed to be exempt from taxation, it shall be separately stated, and the law cited under which the claim is made.

(Laws 1918, ch. 138. In effect March 26, 1918.)

Section 9370, Hemingway's Code, 1927, Volume 2

Penalty for Failure to File Schedule

If any company, corporation, or person, who is required by law to render schedules of its, their or his property to the state tax commission, the purposes of assessment for taxation, shall fail, refuse or neglect to render the schedules, as required such company, corporation or person shall forfeit and pay to the state of Mississippi for every such failure, neglect or refusal the sum of not less than fifty dollars, nor more than five thousand dollars to be recovered by action, which shall be instituted and prosecuted under the direction of the tax commission, and in case of such failure, refusal or neglect, the commission shall make out such schedules from the best information obtainable.

(Laws 1918, ch. 138. In effect March 26, 1918.)

Section 9372, Objections—When Heard

It shall be the duty of the state tax commission on the first Monday in July of each year, or, in case of failure, as [fol. 205] soon thereafter as practicable to convene at their office and hear and determine objections to assessments made by them; and they shall remain in session until all objections are heard and disposed of; and they may, if they think objections just, sustain the same and amend assessments, if necessary accordingly.

(Laws 1918, ch. 138. In effect March 26, 1918.)

Section 9376—Certain Companies Owning Property Not Wholly in One County to be Assessed in Same Manner as Railroads

Telegraph, express, sleeping car, palace car, and dining car companies, and telephone and electric power and light companies, owning property not situated wholly in one county shall be assessed for ad valorem taxation in the same manner as railroads, and the state tax commissioners shall thereto as in the case of railroads, and at the same time and with like effect. The clerks and tax collectors shall perform the like duties as required in case of railroads.

(Laws 1926, ch. 127. In effect January 1, 1928.)

Section 9378—Schedules to be Filed—By Whom

The person or corporation owning or operating a telegraph or carrying on the business of an express, sleeping car, palace car, or dining car company, or owning or operating a telephone line or electric power and light company owning property not situated wholly in one county, shall file the schedule required of railroads within the time and under like penalties; and the schedules shall contain the same or such of the particulars required of railroads, as to the property, its location, and rights of the company as the state tax commissioners shall direct, and such other information, evidence or particulars as they shall demand.

(Laws 1926, ch. 127. In effect January 1, 1928.)

[fol. 206] Section 9379—Assessment of Non-Resident Transportation Company, etc.

It shall be the duty of the members of the state tax commission, constituting the state assessors of railroads and other public service corporations, to annually assess for taxation the property of the persons, firms, partnerships, companies, associations, or corporations as defined in section 2 of this act, engaged in the business of operating, furnishing or leasing cars of the transportation of freight, or to be used in the operation of any railway line, or lines wholly or partially within this state.

(Laws 1926, ch. 129. In effect March 12, 1926.)

Section 9381—to Apply to all Railroad Cars

Every company engaged in the business of operating cars, not otherwise listed for taxation or taxed in Mississippi, for the transportation of freight, wether such freight be owned by such company, or any other person or company, over any railway line or lines, in whole or in part within this state, such line or lines, not being owned, leased, or operated by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture or refrigerator cars, or by some other names, shall be deemed to be a freight line company.

(Laws 1926, ch. 129. In effect March 12, 1926.)

Section 9383—Companies to Make Report to State Tax Commission—Information to be Given

Every company as defined in section 2 of this act doing business or owning cars which are operated in this state, shall, annually on or before the first day of April, in each [fol. 207] year, make out and deliver to the state tax commission a statement, verified by oath of an officer or agent of such company, making such statement, showing as of the first day of February, of the year in which the statement is rendered, the following:

1. The name of the company.

2. The nature of the company, whether a person, firm, partnership, company, association or corporation, and under the laws of what state organized.

3. The location of its principal office, or place of business.

4. The name and post office address of its president, secretary treasurer, auditor, other principal officers.

5. The name and post office address of the principal officer or managing agent of the company in Mississippi, if any.

6. The aggregate number of miles traveled within the state of Mississippi by its cars during the preceding calendar year and the aggregate number of miles over each railroad in the state; and the total number of miles traveled by its cars during the preceding calendar year wherever operated.

7. The average number of miles traveled by the cars of each class of its cars during the preceding year. The number of cars necessary for the mileage traveled within the state of Mississippi, under the circumstances that ordinarily attend the use of such cars, and where different classes of cars are used by said company as to the matters embraced in this and the preceding paragraphs it shall furnish the required information as to each class of said cars on the forms prescribed and furnished by the state tax commission.

8. The actual cash value on the first day of February next preceding, of the said number of cars necessary to pro-

vide for the mileage to be reported as required by paragraph 6 of this section.

9. The real estate, personal property, structures, ma- [fol. 208] chinery, fixtures, and appliances owned by said company, within the state and the location and the actual value thereof, and in what county, municipality, road district, school district or other taxing district where the same was located on the first day of February next preceding.

(Laws 1926, ch. 129. In effect March 12, 1926.)

Section 9385—Failure to Report—Penalty

If any company shall fail, or refuse, to make and file any statements required by this act, or any other statements demanded by the state tax commission, such company shall forfeit and pay the state of Mississippi for each such failure, neglect or refusal the sum of not less than $50.00, nor more than $5,000 to be recovered by action which shall be instituted and prosecuted by the attorney-general under the direction of the state tax commission, and in case of such failure, neglect, or refusal, the commission shall make out an assessment against the company or companies, from the best information obtainable.

(Laws 1926, ch. 129. In effect March 12, 1926.)

Section 9386—Tax Commission to Make Assessment

The State tax commission shall, if practicable, on the first Monday of June, and if impracticable, as soon thereafter as it can be done in each year, make out an assessment against each company subject to taxation under the provisions of this act, and assessment showing the total amount of property of each company for the state of Mississippi, which value shall be determined from the information required by section 5 of this act; and each company shall be assessed with the value of its property within this state and the cars of the said company necessary under the circumstances ordinarily attending the use of said cars for the [fol. 209] mileage to be reported under paragraphs 6 and 7 of section 5, and from such other information as the commission may have or obtain.

The tax commission shall apportion the total value of the cars of each company assessed under the provisions of this

act to the total number of miles of railroad over which the cars traveled, and shall apportion to each county an assessment in the proportion that the number of miles of railroad in the respective counties over which the cars of said company traveled, bears to the total number of miles of railroad over the cars of said company traveled for the entire state and the said statements shall show the assessed valuation for each mile of railroad and the number of miles and name of each railroad and the number of miles and name of each railroad over which the company's cars are assessed. And the assessment when made and completed, shall remain for one month in the office of the state tax commission, open for inspection and be for said time subject to objections thereto which may be filed by the respective companies.

(Laws 1926, ch. 129. In effect March 12, 1926.)

Section 9387—Objections to Assessments

On a day fixed by previous order of the state commission, but not less than 30 days from the time said assessments are open to inspection and subject to objection unless the company shall desire an earlier date, it shall meet in its office and hear and determine objections to assessments made by the respective companies and the commission shall remain in session until all objections are heard and disposed of, and it may, if it think objections just, sustain the same, or any assessments may be increased or decreased, or changed if the same shall appear to be necessary and proper.

(Laws 1926, ch. 129. In effect March 12, 1926.)

[fol. 210] Section 9391—Railroads to File Reports

It shall be the duty of all railroads operating in the state of Mississippi to furnish to the Mississippi state tax commission, on blanks to be furnished by the said commission to the railroad companies operating in the state of Mississipp, a true and accurate record of the car mileage made by the cars of the said companies as defined in section 2 of this act over their rails within the state of Mississippi during the preceding calendar year, said reports to be duly attested by the proper officers of the said railroad

companies and which shall be filed in the office of the Mississippi tax commission on or before the first day of May of each calendar year, or as soon thereafter as they can practically be compiled; said reports to become delinquent on and after the first day of June of the year in which they are due, and the officers of any railroad company failing to make the reports hereinbefore provided shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not exceeding one hundred ($100.00) dollars, or in default of payment thereof imprisoned not exceeding thirty (30) days.

(Laws 1926, ch. 129. In effect March 12, 1926.)

Section 9392—Failure to Report—Penalty

If any company, as defined in section 2 of this act, failing to make a report to the Mississippi tax commission as herein required or which shall fail to comply with any of the provisions of this act shall be prohibited from doing business in the state of Miss., or operating its rolling stock over any railroad in the state of Mississippi; and it shall be the duty of the Chancery court of Hinds County upon application of the state tax commission, to issue an injunction prohibiting all such companies who have failed or re- [fol. 211] fused to comply with the provisions of this act from further operating their rolling stock over any railroad in the state of Mississippi. Provided that all such companies shall have the right to have the injunction issued as above set out, set aside on showing to the court that they have complied with the provisions of this act.

(Laws 1926, ch. 129. In effect March 12, 1926.)

Agreement re Amendments to Bill and Answer

Complainants want also to amend their original bill to correspond with the facts and figures as introduced in evidence, as to the number of acres in the Oldham Road District, the valuation of the real estate owned by the land owners of Oldham Road District, and the assessed valuation of the taxable property of Oldham Road District, and the various classes of property alleged in the original bill,

to correspond with the facts that have been introduced here from the books and records of the County, and the defendants agreed to the amendments referred to;

And it is further agreed that they shall not actually be made in the face of the bill, but that this reference in the record of the case shall be sufficient to indicate such amendments as having already been made, in conjunction thereof, and that the answer, or rather the amended answer of defendants shall be agreed to follow and deny these amendments as correctly alleged.

It is further agreed that the defendants' amended answer in this case, shall be considered as modified and corrected, to include a categorical denial of the allegations in complainant's bill that the Oldham Road District is not a Legislative District.

[fol. 212] T. J. STORMENT, being first duly sworn, testified as follows on behalf of the complainant:

Direct examination by Mr. Mitchell:

Q. Mr. Storment, you were Chancery Clerk of Tishomingo County, from 1924 to 1928?

A. Yes, sir.

Q. As such you were Clerk of the Board of Supervisors?

A. Yes, sir.

Q. You were such Clerk at the time of the organization of Oldham Road District in January and February of 1926?

A. Yes, sir.

Q. State whether or not you issued any process for the Memphis & Charleston Railway Co., in the organization of the Oldham Road District?

Defendants object on the ground it is incompetent, immaterial and irrelevant.

Court reserved ruling.

A. Well all the notice I know anything about was published in the County paper about the election.

Q. That was the only notice that was made with reference to the organization?

A. Yes, sir.

Q. Then if I understand you, you did not issue any process for the M. & C. Railway Co., to file any objections to the organization of this Road District?

A. No, sir.

Q. And no process was issued by your Deputy and served on the Agent and returned as shown by your records?

A. Doesn't show anything.

[fol. 213] Q. And no notation on the general docket was shown that you served any process or published any summons for non-residents land owners of the district?

A. No, sir.

Q. I will ask you whether or not you kept a record of the Oldham Road District in your office at the time it was organized and if so, is this the record you kept in there?

A. Yes, sir.

* * * * * * *

[fol. 214] AGREEMENT RE QUALIFIED ELECTORS

It is agreed that the following names were qualified as Electors of the Oldham Road District, as of January 30th, 1926: Drew Chalmers, O. E. Curtain, Mac Hubbard, J. A. Hubbard, S. J. James, R. L. McKinney, A. M. Nix, J. P. Norris, Will Ramsey, J. T. Smith, L. C. Thompson, P. H. Watkins, W. H. Yarber, J. H. Curtis, Mrs. Atha Nix, O. J. Smith.

No cross-examination.

Witness dismissed.

Complainant rests.

[fol. 215] SAM H. ALLEN, being first duly sworn, testified as follows on behalf of the defendants:

Direct examination by Mr. Cunningham:

Q. What is your name?

A. Sam H. Allen.

Q. What business are you engaged in?

A. Gravel business; General Manager of the Allen Gravel Company.

Q. That is situated in the Oldham Good Road District of Tishomingo County, is it?

A. Yes, sir.

Q. How long you been familiar with the conditions surrounding the pits in Oldham Good Road District?

A. Since 1909.

Q. I believe you are a qualified Civil Engineer?

A. Yes, sir.

Q. Are there any other pits in that Oldham Good Road District except the Allen Gravel Co.?

A. Yes, sir, the Memphis Stone & Gravel Co. is located in that District.

Q. Mr. Allen, are you familiar with the home life and economic conditions, generally, throughout the Oldham Road District?

A. Yes, sir.

Q. How much of your time do you spend out there in that District, Mr. Allen?

A. About 365 days in the year.

Q. That puts you in touch with the citizens and all the conditions out there, does it Mr. Allen?

A. Yes, sir.

Q. Mr. Allen, through your conference relations with the Memphis Stone & Gravel Co., are you familiar with the [fol. 216] quantity and extent of business done by the Memphis Stone & Gravel Co.?

A. Yes, sir, I saw a comparative statement of their tonnage at a rate hearing in Memphis some time last year.

Q. Then through the shipments and operations out there, are you personally familiar with the business done by them, like you are yours somewhat?

A. Yes, sir.

Q. Mr. Allen, can you tell the Court what revenues that community affords the Memphis & Charleston Railroad Co., say for the years 1926 and 1927?

A. Well in 1926, the Allen Gravel Co. shipped 200,200 tons; the Memphis Stone & Gravel Co., from their statement I saw——

Complainants object to statement witness saw of Memphis Stone & Gravel Co., because their books can be produced and best evidence.

By the Court: I think when it comes to accurate evidence, their books would be the best evidence, but I think the wit-

ness can testify from his own personal observations; he can state whether they shipped large quantities of gravel.

Excepted to.

Q. From your knowledge, are you prepared to say how much gravel they shipped in 1926-7?

A. They shipped the same as we did. In 1927, we shipped 215,000 tons and from my observations, I would say that the Memphis Stone & Gravel Co., possibly shipped from, probably from 15 to 30 tons more than we did in 1927.

Q. Well in cars, about how much would that run?

A. About 8,000 to 8,500 cars in 1927; about 7,800 to 8,000 cars in 1926.

[fol. 217] Q. Mr. Allen, are you familiar with the destination of these shipments somewhat?

A. Yes, sir.

Q. About what revenue came to the Railroad, per ton, or per car would you say?

A. The minimum freight rate we ship gravel on, either the Memphis Stone & Gravel Co., or Allen Gravel Co., is 47 cents per ton, and has been since 1922.

Q. What percentage of those cars do you say they would get the minimum rate on?

A. Possibly a tenth of the shipments.

Q. Where does that go to?

A. Goes to Corinth and Alcorn County. The majority of this gravel is shipped from Gravel Siding or Oldham, either, will take an average freight of 70 cents a ton.

Q. An average freight of 70 cents a ton?

A. Yes, sir.

Q. What majority; now what majority——

A. Practically the balance of the shipments; a car of gravel will run, according to our average and Memphis Stone & Gravel Co., from our observations, loads about the same weight, around 57.8 tons per car. That is our general average for the last five years, and figures on a 60 cent freight rate, even, I believe would, the freight would run around $40.00, or better, per car.

Q. Is that a very conservative estimate?

A. Very conservative, yes, sir.

Q. Mr. Allen, what other revenue or patronage do the citizens of that vicinity, of Oldham Road District, afford the Memphis & Charleston Railway Co.?

A. Considerable pulp-wood put on, considerable lumber [fol. 218] has been loaded in the last year or two at Morrison, South of Oldham.

Q. What relation does the construction of that road have, do you think?

A. It gives the people access to Oldham Switch and most of the way to Morrison switch, whereby they could haul material down there and load it much more conveniently and much better than they could have otherwise.

Q. Now, Mr. Allen, does any other Railroad get any of the benefits, any revenue or patronage from this vicinity, except this Railroad Company you speak of?

A. Yes, sir, on joint hauls the other railroad does.

Q. I mean out there?

A. No, sir, no other railroad out there.

Q. Now, Mr. Allen, what freight, incoming freight revenue comes in that community, as patronage of this Memphis & Charleston Railway Co., much or little?

A. Not a great amount, Mr. Cunningham, I should imagine, this is only my observation or best judgment, there is probably $20.00 a day incoming freight to the two pits.

Q. And now to the community around about there?

A. That would be only guess on my part, I could not say.

Q. I believe some of your citizens run a store out there?

A. Yes, sir, one or two little stores out there; two stores out there.

Q. Were they located before or after the improvements in question here?

A. Both located—one located after the improvements and one, before.

Q. Now, Mr. Allen, are you prepared to give us a reasonable estimate of the total revenue afforded to the M. & C. [fol. 219] Railway Co., by pits and citizens out there, annually?

A. Well, from the amount of cars, have estimated the two pits ship a year, and conservative estimate of the minimum freight, the gravel alone would be something like $250,000 in a year.

Q. You mean freight revenues to the company?

A. Yes, sir.

Q. Memphis & Charleston Railway Co?

A. Yes, sir.

Q. All right, what would you estimate the other, outgoing freight, Mr. Allen?

A. That is hard for me to say, because do not know the freight rates on lumber and pulp-wood and things of that kind.

Q. You hardly willing to make an estimate?

A. Hardly willing to make an estimate, because would be purely guess.

Complainants object to all this testimony in reference to the amount of freight, gravel being shipped from these two pits, from this witness, the exact amount of freight can be produced from the records, and that has been waived.

Objection overruled. Excepted to.

Mr. Cunningham: What records you mean?

Mr. Mitchell: Records of the M. & C. Railway Co.

By the Court: I think the witness hasn't been called on to give absolute figures. Of course, if that was the case, he would have to have the records; he has been called on to give the situation, generally, from his observations, while his observations may not be binding on the court, I think he is entitled to put that in the record.

Excepted.

Mr. Cunningham:

[tol. 220] Q. Mr. Allen, is that an accessible record of the number of cars going out from the Allen Gravel Co., pit?

A. Yes, sir.

Q. Before we close, will you furnish the exact number of cars as per your record?

A. Yes, sir. Will take me some little time to telephone to Memphis to have them sent out here, but I can send them in a day or two; we have every car we shipped and the exact amount of tonnage.

Q. Well it is not that necessary to be exact. Now, Mr. Allen, you said the conditions that existed out there previous to these improvements, were bad. What were the road conditions out there previous to this improvement?

A. You mean the general road conditions?

Q. Yes, sir.

A. Well we had two trunk line highways built out in that county; one considerably North of the pit and one, south

of the railroad and the Oldham Road District was absolutely a trail, as far as a highway was concerned; people could not get over it very well in the winter time on account of the mud and bad conditions that existed on it.

Q. Where did your labor live?

A. Practically all my labor lived on the Oldham Road District.

Q. And prior to the construction of the road, did they live in that vicinity?

A. Yes, sir.

Q. What about the labor that operated the Memphis Stone & Gravel Co.; where did they live if you know?

A. Considerable of them lived on the Oldham Road District and considerable, lived at Oldham.

Q. The condition you described that surrounded your labor out there, does that have application to the Memphis [fol. 221] Stone & Gravel Co., labor also?

A. Yes, sir, I think it does.

Q. Situated as you were before this improvement out there; that is, the Allen Gravel Co., and the Memphis Stone & Gravel Co., what disadvantage were you under relative to keeping labor out there and operating your pits?

A. Well, I couldn't truthfully say what the Memphis Stone & Gravel Co., conditions were, because I did not watch their labor to that extent, but it was rather hard for us to keep labor, specifically skilled labor.

Q. Why?

A. Because had no schools and had no roads to go to and from the pit and it was impossible for us to keep absolutely first class labor unless we permitted them to live in Iuka, which was very inconvenient, and had it not been for the building of the road and the school it would have considerably hampered us in the operation of the Allen Gravel Co., and possibly if it had continued for an indefinite length of time, might have put us out of business, for labor.

Q. Now, Mr. Allen, your competitive industries over the country generally; were your competitors so hampered over the country about their roads and schools, cheaper freight, and things of that kind?

A. No, sir; our competitors at Columbus are located absolutely on a road and located convenient to schools and other competitive concerns.

Complainant objected to conditions of the sourroundings and other circumstances of these other gravel pits there and in the State of Mississippi and fa-ther South, and Columbus, going into this record.

By the Court: I think you will have to confine the testi-[fol. 222] mony along the line of conditions in the Oldham Good Road District, and what effect the building of road in question had or would have on the particular conditions out there, regardless of what might have been in other places.

To which defendants excepted.

Q. Now, Mr. Allen, that unrest you speak of out there among your labor, that you speak of because of the want of roads, and inability to go to school and church: did that unrest; was it manifested in the Memphis Stone & Gravel Co., labor as well as your labor?

A. Mr. Cunningham, I made the statement a while ago, I could not intelligently answer that question, because I am not absolutely familiar with the Memphis Stone & Gravel labor.

Q. Well, did the same conditions and environments surround one pit that did the other?

A. Yes, sir, same conditions and environments surrounded one pit as the other, but whether or not their labor was dissatisfied or not, I could not positively say.

Q. Now since the construction of this road, has your business increased or decreased?

Complainants except to the foregoing question, on the ground that it is incompetent and irrelevant, not having shown the cause of any decrease or increase and the construction of the Oldham Road District, and in our opinion is not competent on the issues in this case.

By the Court: Gentlemen, I will let you put that in there under a reserved ruling, however with the explanation of the Court: You will have to show, before the Court will consider that much is competent, you will have to show the construction of the road the increase.

Excepted to.

[fol. 223] Q. Has it increased or decreased?

A. Yes, sir, it has increased.

Q. Mr. Allen, could that increase have come about if that same condition of unrest of your labor had existed that you spoke of immediately prior to the construction of this improvement; could that increase have come to you?

A. I do not think we could have increased our business had it not been for the labor being satisfied.

Q. Do you think you could have handled your business?

A. No, sir, I do not.

Q. Was the increase for 1926; has it been small or great?

A. It has been rather considerable; much more so than it was from 1925 to 1926.

Q. What has been the effect of this improvement out there on the development of the community, farms and farm houses and fields and lands?

A. Been considerable improvement in the way of farm houses being built, and been a little mercantile business established out there and a Dairy established since the road was built; been considerable acreage cleared up.

Q. What effect does that have on the revenues of the railroad in that community?

A. I could not say exactly, what the exact revenues has been, but the general revenues has been increased on account of that.

Cross-examination by Mr. Mitchell:

Q. Mr. Allen, you say you are well acquainted in this community and have been for a number of years, of the Oldham Road District?

A. Yes, sir.

[fol. 224] Q. The agricultural products of that community now and have been long before the organization of the Oldham Road District, hauled to market at Iuka, have they not?

A. Yes, sir.

Q. Cotton and corn are practically the products raised in that community out there?

A. Yes, sir.

Q. And Iuka——

A. Is the shipping point.

Q. And that is where they have brought their agricultural products to market before the Oldham Road District was organized?

A. Yes, sir.

Q. Now, the Allen Gravel Co., and the Memphis Stone & Gravel Co.—are they partnerships or corporations?

A. Corporations.

Q. How long has the Allen Gravel Co., been operating a gravel pit at the siding?

A. Since 1913.

Q. How long has the other company been in operation?

A. Memphis Stone & Gravel Co., went into business in 1914, I think it was.

Q. Memphis Stone & Gravel Co., is located on a spur called Oldham is it not?

A. Yes, sir.

Q. And the Allen Gravel Co., is located on a spur called Gravel Siding?

A. Yes, sir.

Q. Now in 1925, the Lee Highway was opened up through this immediate territory and through Oldham Road District, was it not?

[fol. 225] A. Through that part of Oldham Road District, yes.

Q. Which runs through Oldham does it not?

A. Through the pit?

Q. Yes, sir.

A. Yes, sir.

Q. And it runs within 100 or 200 yards of the siding?

A. Gravel Siding; yes, sir, about 200 yards.

Q. That is a state road project is it not?

A. Yes, sir.

Q. Kept up by the State Highway Department of Mississippi?

A. Yes, sir.

Q. And in going from Iuka to either one of these places, there was a highway leading to or adjacent to the other, before the construction of the two roads in the Oldham Road District?

A. The Lee Highway was built before the Oldham District.

Q. The Free Bridge Road runs along through there and North of the Oldham Road District, from a half to three-quarters of a mile of the North boundary line of the Oldham Road District, does it not?

A. No; it may come that close to it in some spots, but gets considerably farther away from it.

Q. Of course at Bear Creek it does, but I am talking about the North boundary line of Oldham Road District?

A. Yes, I imagine it is right immediately north, yes.

Q. No part of this road that is constructed, is out of Oldham Road District, is it?

A. I don't really know Mr. Mitchell whether it is not.

Q. If that red line up there indicates that part is outside of the Oldham Road——

A. If that map is correct, yes, sir.

Q. Now the Memphis & Charleston Railway Co., has been [fol. 226] doing the hauling for the two gravel Companies since they have been in business out there?

A. Memphis & Charleston or the Southern, whichever way you may call it, yes, sir.

Q. And that is the only company that has been hauling any gravel away from those two places?

A. No, sir.

Q. How is that?

A. No, sir, it is not.

Q. They have shipped some by truck?

A. No, sir, M. & O. Railroad ran a train out there.

Q. That was before the organization of the district, was it not?

A. Before the organization of the Oldham District?

Q. Yes.

A. Yes, sir.

Q. Now they haven't operated a train out there for the last three or four years, have they?

A. Who do you mean by "they?"

Q. Mobile & Ohio.

A. No, sir, they haven't operated a train out there for the last 13 or 14 years.

Q. Now that country out there is that what you would call a hilly country, is it not?

A. Somewhat, yes, sir.

Q. The timber is mostly pine?

A. Mostly pine, yes. Little bottoms have considerable hardwood in them, some soft wood, such as gum and things of that kind.

Q. This timber had practically; the best timber had been cut off the majority of this land in Oldham Road District prior to the organization of the Oldham Road District, had it not?

A. Old growth was cut from this entire section, Mr. [fol. 227] Mitchell, years ago. There was considerable young growth timber in the country and is yet.

Q. Any saw mills in the Oldham Road District?

A. Yes, sir.

Q. And they haul or truck their lumber to Iuka?

A. No, sir.

Q. They do not?

A. No, sir, they put it on to these spurs down there.

Q. What spur?

A. Morrison's Spur.

Q. Where is Morrison's spur?

A. About quarter of a mile east of Oldham.

Q. That is outside of the Oldham District?

A. I imagine it is right in the edge of the Oldham District; almost, yes, sir. How far does that map show from Oldham?

Q. Little over half a mile?

A. The point of the spur is right close to that boundary line.

Q. Now the Lee Highway runs pretty close to that switch does it not?

A. Yes, sir, within 5 or 600 yards.

Q. And it was constructed and could be used, hauled over to this switch before the construction of the Oldham Road District?

A. They come down the Oldham road and hit the Lee Highway and go down through the field and the Morrison spur.

Q. Now there was saw mills out there before any road was constructed in that immediate vicinity, wasn't there?

A. Yes, I expect there was saw mills in this country before the railroad was constructed.

Q. That is what I say?

A. Yes, sir.

[fol. 228] Q. And they have some well developed roads leading to the saw mills?

A. Ordinarily not, no, sir.

Q. And it takes a crew of men to run a saw mill?

A. Yes, sir.

Q. And they managed to get enough labor in this immediate territory to run saw mills before this hard surface road, or roads were built?

A. Once in a while they did; sometimes they did not.

Q. Has your Allen Gravel Co., in the last five years been shut down on account of labor?

A. No, sir, we never have shut down on account of it, we have been considerably short lots of times.

Q. Has the Memphis Stone & Gravel pit been shut down on account of labor in the last few years?

A. I do not think they have shut down on account of labor; they have had considerably much trouble like we did; they have had to import labor from Memphis several times to keep in operation in the last 5 or 6 years.

Q. Most of your trouble has been in the winter?

A. It has not, no sir, it has been continual up to the last year or two.

Q. Now the railroad don't haul the material out there and deliver to those people who have been constructing new houses out there, do they?

A. No, sir, they haul it to Iuka and it is delivered from Iuka.

Q. Well the lumber, they construct their houses out of?

A. Some is hauled from Iuka, the flooring and siding and inside material.

Q. Most of the stuff is obtained here locally?

A. Most of it. I bought some from Corinth from Mr. Hazzard for a house and sent out there, except the flooring, [fol. 229] they buy that mostly from Corinth.

Q. Iuka is a shipping place?

A. Yes, sir, Iuka ships considerable lumber, but makes very little dressed lumber.

Q. I believe you stated that there had been an increase in the shipment of gravel from these two pits in 1926 and 1927?

A. Yes, sir.

Q. I will ask you if you haven't shipped a great deal of gravel to what is known as the over-flowed territory in the Delta during the year 1927?

A. Not very much, Mr. Mitchell. Columbus had a better frieght rate in there and shipped most of that gravel and we shipped very little, not any more than we usually ship.

Q. Would you say that the increase of your shipments of gravel from Allen Gravel put was increased on account of the construction of these roads in the Oldham Road District?

A. I will put it this way: from the fact of the labor being satisfied, I think it really was, yes, sir.

Q. In other words, the people away knew there was an Oldham Road District, and they gave you more orders for gravel on account of that?

A. No, sir, but I could not have loaded it if it had not been for satisfied labor, regardless of how many orders I had.

Q. If you got more orders than you did get and you had labor to do the work, you do fill the orders?

A. If my labor was satisfied, yes, sir, but it wasn't satisfied and I couldn't possibly loaded any more than I did load.

Q. I will ask you if in 1925, you had to turn down any orders on account of not being able to fill them?

A. Yes, sir.

Q. In 1926?

A. Yes, sir.

[fol. 230] Q. 1927?

A. Yes, sir.

Q. Prior to that?

A. Well, I don't remember all the way back, Mr. Mitchell, but in those three years, I can remember pretty well I turned down business because wasn't able to fill it.

Q. Then if I understand you, you are doing more business out there than you are able, greater demand than you are able to supply?

A. We have at times, yes, sir.

Q. Is that true now?

A. No, sir, never is true in bad winter months.

Q. Has business slumped in 1927?

A. No, sir, business was more than in 1926, and still more in 1927.

Q. What is the tendency this year?

A. Why, it is too early to say.

Q. What is shipped in to these two businesses a day; you say it will average about $20.00 a day; what is shipped in there by the railroad to those two businesses?

A. Mr. Mitchell, we buy all of the iron that goes into the upkeep of two locomotives, two steam shovels and big heavy screen; we buy all the parts that goes into the up-keep of those things, and we buy picks and shovels, we buy waste and oil and everything that goes to the up-keep of a gravel pit.

Q. And you have done that ever since you have been running your gravel pit in that particular place?

A. Yes, sir, if we didn't do that we couldn't keep it open.

Q. So the receiving shipments are under the same conditions and circumstances in 1926 as 1927?

A. No, sir, if the business is more in 1927, the incoming [fol. 231] business is bound to be more, because the upkeep is more.

Q. But that is the way you have been getting your supplies all the time?

A. Oh, yes, sir, sure.

Q. Now your supplies, as far as the machinery, up-keep of the machinery, are hauled over this Oldham Road, constructed in the district?

A. No, sir, they come by rail.

Q. I believe you stated that there were two stores located out in that territory. What store was located before and which one afterwards?

A. I think Mr. Paul Watkins' store was located before.

Q. Where was it located?

A. Right in the forks of the Oldham Road and Lee Highway; I think it was located before the Oldham road was built or before it was finished anyway. The little store of Mr. Chanlers has been located since the Oldham road was located.

Q. Mr. Watkins had a store out there a number of years before even the Lee Highway was built?

A. Yes, sir, but not right where it is now.

Q. And as soon as the Lee Highway was built, he built it right on the edge of the Lee Highway?

A. Yes, sir, put it right between the two roads, I think.

Q. You say there is saw mills in the district or near the district at the present time?

A. There is one saw mill down that way Mr. Mitchell; I I can't say exactly whether right in the district or just out of it; I am not postive.

Q. Is it on the Lee Highway?

A. No, sir.

Q. On the Free Bridge Road?

A. No, sir, between the two roads.

[fol. 232] Q. Is it on the Oldham road?

A. Yes, sir, adjacent to the Oldham road, possibly quarter or half a mile from it.

Q. When you strike the Oldham Road District on the Free Bridge Road you are about 2¼ miles from Iuka?

A. About that, yes, sir, 2 or 2¼ miles.

Q. And it is three miles from that place to Morrison's switch is it not, by road?

A. Mr. Mitchell, I am not absolutely sure of the distance from where it leaves the Free Bridge road to Morrison's switch but I would imagine about 2½ or 3 miles.

Q. The Oldham Road District is down a hill practically, from the Free Bridge Road, to the pit, is it not; rather level on down the hill, going toward the pit; it is a gradual fall?

A. Yes, sir, the tendency is downward.

Q. And the Free Bridge road is built on a ridge?

A. Not a ridge, rather crosses considerable of that county, goes through considerable of that broken country.

Q. Now in hauling freight or commodities or agricultural products or lumber and things like that, those people up on the North side of Oldham Road District would be nearer to Iuka than to the switch or Oldham District Siding, wouldn't they?

A. Altogether on what part of the north you are talking about, northeast portion would not.

Q. Well in the northwest portion?

A. Northwest portion, probably would, yes, sir.

Q. Your gravel is all billed at Iuka?

A. Yes, sir.

Q. And all the freight that is shipped out over Oldham Road District, is billed at Iuka?

A. Yes, sir; well there is a little bit billed sometimes at Riverton Junction going east, but very little; practically [fol. 233] all of it is billed at Iuka.

Q. This revenue that you are talking about, or increase, is not all revenue of the Southern Railroad Co., is it?

A. Some is joint line haul.

Q. And in a joint line haul over the two roads, the Southern gets its pro rata share?

A. Minimum of 42 cents.

Q. Out of every dollar earned by the Railroads in 1926, you know that the gross earnings of the railroad, the operative expense amounted to about 75 cents, do you not?

A. No, sir, I do not know that, but I know they declared a dividend on the common stock, which they had not done in the last two or three years.

Q. You don't know that the operating expenses amounted to about 76 cents?

A. All the information I have about that is newspaper information; I haven't any stock in the Southern Railway Co.

Q. You take your expenses of your gross increase from your revenues?

A. Why certainly.

Q. What is your gross expense?

Defendants object to that.

A. I would not answer that anyway, whether you objected to it or not.

By the Court: I do not think that is competent.

Excepted to.

Q. What is your gross receipts on the number of tons you ship?

A. I don't care to answer that either.

Q. Defendants object to that, irrelevant and incompetent.

[fol. 234] By the Court: That is personal business and do not think competent.

Counsel for complainant argued the matter as to that.

By the Court: Here is my idea about this question. This Court will take judicial knowledge of the fact, matter of common knowledge, matter of absolute fundamental business; we all know that gross receipts do not mean net receipts; and if the railroad got $250,000 of the gross receipts out of this business, that does not mean the railroad company made any $250,000 in profits on it, or any such amount; it follows however, before the railroad Company, can make any profit at all, they must first get the gross business and exercise the best diligence they can to get the net business. A road district is designed for all the people in it, and on that feature, I sustain the objection. You can't go into whether the Allen Gravel Co., is making any money out of their business.

Excepted to.

Q. You don't know of your own personal knowledge that the railroad makes anything on hauling this gravel, do you?

A. No, sir.

Redirect examination by Mr. Cunningham:

Q. Mr. Allen, the Oldham Road District, pit vicinity out there, is that source of gravel exhaustible or inexhaustible from a practical standpoint?

A. Well I would say that the gravel in Oldham Road District is in exhaustible.

Q. Now considering the quality of gravel and quantity of gravel and the situation of the gravel out there, is there any [fol. 235] other nearer source of gravel in this country that can compete with it?

A. Not where the freight rates are equal, no, sir.

Q. I mean in this immediate country?

A. No, sir.

Q. Any other pit in this immediate vicinity?

A. No, sir.

Q. What is the nearest?

A. Golden Gravel Co., situated at Golden, Miss., in the Southern end of the county.

Q. Is the Golden Gravel pit so situated as to being a practical source of supply for this territory?

A. No, sir, they have a two line haul where we have a one line haul to the territory.

Q. Now, Mr. Allen, what is the character of that gravel as compared with the character of gravel in the Oldham Good Road——

Complainants object to all that.

By the Court: Let you go ahead, but think getting pretty far from the point.

A. Well the gravel at Golden is a sand gravel and isn't a comparable gravel at all, when comes to road building; good for concrete business, but not for road building.

Q. Mr. Allen, what is the demand in this country, by the development of the country, for gravel; such gravel as the

Oldham Road District is mining and affords the country; what is the demand; is a growing or waning demand?

A. Well, that is purely a question, that I could only guess at, but I think from things I see over the country, that the demand is gradually increasing.

Q. Is it of such a nature as to be permanent demand in this country for such gravel as you mine out there?

[fol. 236] A. Yes, sir, I think so.

Recross-examination by Mr. Mitchell:

Q. Mr. Allen most of your gravel is used for the construction of roads?

A. Yes, sir, most of it is.

Q. And there has been an increase of hard surface roads that has been constructed in the last two or three years, is it not, over this section?

A. What do you mean by hard surface roads?

Q. Gravel roads.

A. Yes, sir.

Q. And that is one cause of the increase in your business?

A. Why certainly.

Mr. Cunningham:

Q. Does your gravel afford, what about the up-keep of gravel roads; is your gravel used in the up-keep of gravel roads?

A. Yes, sir, considerably.

Witness dismissed.

L. D. Gains, being first duly sworn, testified as follows on behalf of the defendants:

Direct examination by Mr. Cunningham:

Q. Mr. Gains, you are active manager, officer of the Iuka Guaran*dy* Bank, Iuka, Mississippi, aren't you?

A. Yes, sir.

Q. And were at the time of the organization of the Oldham Road District and seller of the bonds for that District?

[fol. 237] A. Yes.

Q. When were those bonds sold and paid for, Mr. Gains?

A. In 1926. Here is the County Depository record.

Q. What did,—what day did you realize on the bonds, did the district realize on the bonds?

A. On the 19th day of May, 1926. I want to add they were presented to us on the 10th, but we had to send a couple of bonds to the Bonding Attorney to get his final opinion. We got a preliminary opinion on the 10th and turned over to that district on that date, but did not actually realize the money until on the 19th.

Q. Mr. Gains, when was the proceeds of these bonds disbursed?

* * * * * * *

[fol. 238] Q. What did the bonds bring in cash?

A. $6,565.65; premium of $65.00.

Q. Who bought the bonds?

A. I bid them in for Mrs. Kate Hubbard. I bid them in rather, in the Bank's name.

Q. But you were really her agent?

A. At her request I bid them in.

* * * * * * *

[fol. 239] Q. Mr. Gains, you are familiar with the Oldham Road District territory and the people out there?

A. Well I know 90 per cent of the people, maybe out there, yes, sir.

Q. Have you frequently been in that vicinity?

A. Yes, sir, I am out there two, three or four times during the year.

Q. You are familiar with the economic and business conditions of the citizens of that vicinity out there?

A. Yes, sir.

Q. What was that condition in the Oldham Road District relative to roads, churches and school facilities, prior to this improvement of the Oldham Road District; was it good or bad?

A. Exceedingly bad.

Q. I believe their labor to these two industries out there, gravel pits, I believe their labor lives——

Object to leading.

Q. Where does that labor live?

A. Well the majority of it, as I know them, lives north of the pit, north of the railroad.

Q. What relation does these improvements, roads in the Oldham road district, what relief do they give to the people living in that vicinity of the roads in Oldham Good Road District?

A. Well good many live up and down the road now; some of them quite a little distance from it, about 100 yards, however.

Q. What were those conditions before the building of these roads, compared with other communities in the county, was it keeping pace or not?

A. No, sir, it was not.

Q. Have you been able to ascertain, the condition of the general economic development in that community from the [fol. 240] construction of this road improvement in the Oldham Road District?

A. I notice quite a few fields being open up and quite a few houses being built on it and I know two people who pulled up and moved off a few years ago, and since they get to the consolidated school, have moved back from Arkansas.

Q. What about the financial status of those citizens in regard to their bank deposits; are they more prosperous or less since the construction of that road?

A. Well they have more actual cash on hand.

Q. Does that community patronize your Bank exclusively?

A. Yes, sir, I do not know of any one out there that has got an account elsewhere.

Q. How does that community out there, Mr. Gains, if you know, compare, as a revenue source to the railroad company, compare with other communities of this county, is it greater or smaller, compared with others?

A. Well, I should think it was very much greater, being three gravel pits there, switches for other freight and pulp wood and timber.

Q. In your judgment from the facts you have outlined and the familiarity you have with the railroad business and the community, general, would you say the railroad company's benefits, are greater or smaller from this improvement?

A. Well I think they have been benefited; I could not say to what extent, but I know one thing, that we handle quite a few bills of lading for pulp wood which is shipped from Morrison spur and Gravel Siding and Oldham we didn't use to get.

Q. Mr. Gains, with the development of other communities, could that labor and citizenry that supports these pits, in your judgment, could have been kept there if not for [fol. 241] these improvements?

A. I do not think could have gotten them as quickly and readily.

Q. You think the citizens would have staid there in the absence of these things?

A. I know of two families that pulled up and left there a few years ago, because no churches and schools, at least that is what they told me——

Complainant objects to what they told him.

By the Court: I think the statement for reasons of leaving would be competent.

Excepted to.

Q. Mr. Gains, I believe as Manager of the Bank, you say you come in contact with those citizens?

A. Yes, sir.

Q. I want you to state to this Court, what effect the conditions you described a while ago before this improvement, what effect that was having on that community, as to whether producing rest or unrest among the people?

A. I am frequently in that community in the interest of schools and other matters, being invited out there quite a few times to make a little school talk and quite a few agitating the school, and I know very large improvements in a school way, and now having built a church, brick veneered, and I consider the community is improved 100 per cent from a school standpoint, as well as the church.

Q. Is the spirit of contentment better or worse?

A. Better.

Q. Mr. Gaines, I hand you a loose leaf Bank sheet. I will ask you what that sheet is?

A. That is a ledger sheet from my bank ledger, with the [fol. 242] Oldham Road District, May 19th, 1926 to the present.

Q. Does that show the disbursements in the same way that the pages that you introduced to your evidence a while ago, shows?

A. The same record, yes, sir.

Q. And dates?

A. I don't know just about the dates.

Q. Well substantially the same?

A. Yes, sir.

Q. In addition what does it show?

A. Credits and amounts and dates, daily balance.

Q. In fact, that is the additional information that sheet shows to those sheets you had a while ago?

A. Yes, sir, my daily balance.

Q. It don't effect the sheet, of course, that daily statement, status quo?

A. Yes, sir.

Q. Who kept that Mr. Gains?

A. Sometimes I did, and sometimes Mr. Roade and again Mr. McRee.

Q. Was that under anybody's supervision?

A. Monthly, I checked everything.

Q. What supervisory attention did you give the work in the bank daily?

A. Every month when we turned in the report, before bringing it over, I checked from the County Depository book this, and verified it, not only this account, but every County account.

Defendants offer this sheet, showing daily balance. To which complainant objected, for several reason-: 1st, not shown it was kept by Mr. Gains, and the other is, it don't show anything about what it is for, any of the receipts or disbursements are for, and another reason, that if it is records or showing of the County warrants, as expended by the Board of Supervisors, the cancelled county warrant is [fol. 243] the best evidence, and for another reason, that it purports to be a record of transactions not had with the complainant and of which complainant is not shown to have had any notice.

By the Court: Here is my idea about this, and I want to ask Mr. Gains one or two questions to see if competent, and not competent as it stands now.

By the Court:

Q. Is that one of the regular books and records kept in the Bank?

A. It is.

Q. Is it kept by honest and competent bookkeepers?

A. It is.

Q. Came here from the regular County Depository?

A. I took it out of our records a few minutes ago; they sent me back for it after I came here.

By the Court: All right, gentlemen, I think it is competent so far as it is shown it was competently and regularly kept and be admitted under the same reserved ruling as heretofore made.

Cross-examination by Mr. Mitchell:

* * * * * * *

[fol. 244] Q. Well now you testified that there were loading switches in that Oldham District. I wish you would name a single loading switch outside the gravel loading switches, in that district?

A. Well don't know that there is any, Gravel Siding and Oldham and Morrison, the only three I know of.

Q. Is the Morrison in the Oldham Road District?

A. I don't know that.

Q. Now you are acquainted in that community out there?

A. Fairly well, yes, sir.

Q. How many qualified electors in the District?

A. I would guess 25 to 40, between 25 and 40.

Defendants object to that line of inquiry on the ground that has all been settled by the Board of Supervisors, and adjusted.

By the Court: An entirely immaterial proposition, and have already introduced into this record, a list of the qualified voters; Mr. Gains been in nearly every man's home in the District.

Excepted to.

Q. How many homes are on the road between the Free Bridge road and the Oldham pit?

A. I don't know what road you call the "Free Bridge Road."

Q. I say how many houses on the Oldham Road that was constructed between the Free Bridge Road and the Oldham Gravel pit?

A. Well, I don't know the Free Bridge road.

Q. Well, if it is the road that goes out north from Iuka, goes out east and north of the Southern Railway Co., and is the road this gravel road taps, how many houses from the top where that road taps the road down to the Gravel pit?

A. That would be mighty hard to answer: most people don't build right on the road, but from 200 yards.

[fol. 245] Q. How many houses that leads from the forks down to Allen siding?

A. I don't know sir; I never counted those back in the bushes, there is a crooked road down through there.

Q. The commodities that come into Iuka from that immediate neighborhood, has always come in here as a matter of fact, has it not?

A. Cotton, yes, sir.

Q. And corn products, and that is a condition since and before the organization of the district?

A. For the cotton and corn yes, sir.

Q. The lumber that is cut out there, practically all of it comes to Iuka, does it not?

A. I don't think so; I see quite a lot of it taken out there every day.

Q. I am talking about 2 x 4's?

A. I remember on number of occasions loaning money on lumber staked at Gravel siding.

Q. About how many cars, you say you have handled bills of lading for shipment out there?

A. Yes, sir.

Q. How many would you estimate you handled during the year 1925?

A. I wouldn't know just exactly to say how many at that particular Oldham pit or Gravel Siding. Mr. John Paine frequently handles pulp wood and I handled his bills of lading for him.

Q. How many cars of pulp wood?

A. I didn't keep a record and I would not want to state without a record.

Q. In 1926 or '27?

A. I don't think he shipped any then.

Q. All the people who live in the northwest corner of [fol. 246] the Oldham Road District, are nearer to Iuka than they are to Oldham pit are they not—loop up here on the map—that is 20 up there?

A. I am not familiar where the line comes from. Would say it was closer to where it taps——

Q. From the Free Bridge road to Iuka?

A. No, sir, I should think 4 miles to where it taps; does too, crosses over it.

Q. If the map shows it is 2——

A. The way the cros flies, be two or three.

Q. I will just hand you a county map and let you see Iuka and here is Oldham Road District and tell me how far from the center of Iuka to the Northwest corner of Oldham road?

Defendants object on the ground, the map speaks for itself; a section is a mile square and everybody knows it. In due regard to my friend, Mr. Mitchell, we are not holding a school in arithmetic.

By the Court: Only thing to give this witness knowledge of the community.

Excepted to.

Q. You say 4 miles. If that map is correct, it ain't one mile from the edge of Oldham Road District to the end of complainant's line?

A. I told you while ago about where it tapped the Free Bridge road; I didn't say the Oldham Road District——

Q. It taps it 100 rods east of the district, how far would you say it was from the complainant's line of Iuka?

A. I don't know the east line of the Oldham district; I know where the road comes off——

Q. Then you say it is about 4 miles where it taps that road?

A. Going over the road, that would be my guess.

[fol. 247] Q. And all your testimony has about the same basis?

A. I don't admit that, no, sir.

Q. Now you talking about developing that school out there and church in that community. If the Southern Railway Co., pays 65 per cent of the taxes of that school out there, it is very much interested in the very thing you are talking about?

A. Should be, I should think.

Q. Or if it pays as much as 72% it is paying right smart of the school tax out there?

A. I don't know whether the school is the same district as the Oldham road or not.

Q. How much taxes is the Iuka Guaranty Bank paying on that road out there?

Objected to. Sustained. Excepted to.

Q. Would you say that land per acre has been benefited 80 times more than the other acres of land out there?

A. I wouldn't say 80 times, but I would say 100 per cent, double it.

Q. You mean to say if that property has been benefited 1%, then the railroad has benefited 100%?

A. I did not say that.

Q. What did you say?

A. I said I considered that land in the Oldham Road District — been benefited 100%.

Q. In other words, that land is worth twice as much now as in 1926?

A. I would consider it easily so, yes, sir.

Q. How about the other land out there?

A. Well I am speaking of the land in Oldham District.

Q. You believe all the farming land has been benefited [fol. 248] 100% by this road district?

A. I did not say all, but speaking up and down the road and next to the school building and church.

Q. You think the Railroad was benefited twice as much as the property owners who live along this road, where the road is built?

Object to that. Court reserved ruling.

A. Quite sure they have been benefited, but I could not say to what extent.

Q. Now there is a general, not only in this Oldham Road District, but in all communities in Tishomingo County, par-

ticularly, there is a development of schools and churches is there not?

A. Ask that again?

Q. Throughout Tishomingo County, there is a general development of schools and churches is there not?

A. Not throughout the county, no, sir.

Q. Well greater portion of the county?

A. Biggest portion, yes, sir; I think 40 or 50 per cent, may be 60%.

Q. And a greater development of roads throughout this county?

A. In 60% of it, yes, sir.

Q. And this is a necessary development that is going on in a general way in the county?

A. Not all over the county.

Q. I say in the biggest part of it?

A. Where — got good roads and consolidated schools, yes, sir.

Q. You mean to say that the right of way of the railroad is specially benefited by the construction of these roads in Oldham Road District?

A. Well, I did not say that, I don't think.

Q. Just a general benefit to the community?

[fol. 249] A. I think they have been benefited from the increase of revenues that is shipped from out there, yes, sir.

Q. Is there *is* such revenue?

A. Well, my being a judge, there is such revenue.

Redirect examination by Mr. Cunningham:

Q. Mr. Gaines, you said about 60% area of this county, where roads and schools have been developed, and churches, and about the same percentage where roads are developed?

A. Yes, sir.

Q. I want to ask you if the development of roads, and development of schools and churches go together or not?

A. Yes, sir, they do.

Q. Now what is becoming of that area that has not had this development, is it prosperous and building up, or is it depopulating and going down?

A. Depopulating very rapidly.

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[fol. 250] R. C. GRISHAM, being first duly sworn, testified as follows on behalf of the defendants:

Direct examination by Mr. Cunningham:

Q. You a member of the Board of Supervisors of Tishomingo County in 1926? and were you throughout the year?

A. Yes, sir.

Q. Representative of the First Supervisors District of said County?

A. Yes, sir.

Q. In which Oldham Good Road District is situated?

A. Yes, sir.

Q. You remember when that District was formed?

A. I do.

Q. You remember the occasion when you passed that order?

A. Yes, sir.

Q. Creating the district?

A. Yes, sir.

Q. Mr. Grisham, at the time you passed that order, what was your understanding about the north boundary line of that district, reaching the Free Bridge Road. Did you think it met that road or not?

A. I did.

Q. I see it lacked a little of meeting, a little, where the road is located?

A. Yes, sir.

Q. That about .3 of a mile?

A. About that.

Q. How did you construct that road outside of the Oldham Road District up to Free Bridge road?

A. Out of First District funds.

Q. Use any of the Oldham Good Road funds?

A. Did not.

* * * * * * *

[fol. 251] OFFERS IN EVIDENCE

By consent of complainants and defendants we now introduce in evidence Chapter 278 of the laws of 1926.

Clerk here copy.

Chapter 278, Laws of 1926—House Bill No. 1280

An Act creating and validating the creation and organization of separate road districts, fixing and confirming the boundaries thereof, validating the authorization, issuance and sale of bonds thereof, and the contracts and agreements made by the board of Supervisors, authorizing the performance of contracts and payment therefor, providing for the issuance of additional bonds, and providing for the payment of bonds and authorizing levy of taxes for constructing and maintaining of roads therein, and payment of bonds therefor.

Road Districts and Bonds Validated

Section 1. Be it enacted by the Legislature of the State of Mississippi, that in cases where the board of supervisors of any county in this state has organized or attempted to organize a road district under the provisions of the statutes of this state, where creation of said district or the issuance of the bonds thereof has been validated or attempted to be validated by any statute enacted during the 1926 session of this legislature, such district, with the boundaries set forth and described in the minutes of the board of supervisors or set forth and described in any act passed at this session of the legislature, be, and the same is hereby declared to be a valid road district of such county, and the organization and creation and all orders, resolutions and proceedings of the board of supervisors in connection with such organization and creation, be and they are hereby confirmed and ratified.

[fol. 252] Bonds Issued Legal Obligation of District

Section 2. That all bonds of any such district referred to in section one of this act which have heretofore been issued and are now out-standing are hereby validated and declared to be the outstanding, binding and legal obligation of such district, and all orders, proceedings, and resolutions of the board of supervisors and their acts in the sale of such bonds be and they are hereby approved, confirmed and ratified.

Acts of Supervisors Ratified

Section 3. That the appointment of road commissioners and all orders, resolutions and proceedings of the board of supervisors and of such road commissioners relating to the making of agreements or execution of contracts for the construction or maintenance, or both, of roads in any such district as is referred to in section one, hereof as shown by the minutes of the board of supervisors or the reports of said commissioners filed with the board, be and the same are hereby approved, confirmed and ratified, and are hereby declared to be binding upon the board of supervisors, road commissioners and road district, and all payments heretofore made thereunder and the acts of the board in approving such payments, of the clerk in the issuance of warrants therefor, and of the county depository in the payment of such warrants, are also approved, confirmed and ratified; provided, that nothing in this act shall be construed to confirm, ratify or validate any act or acts, contract or agreements or other transactions mentioned herein unauthorized by or in violation of any law of this state under which the board may have been acting, provided this exception does not apply to mere irregularities, and in all cases where any road or roads ordered or contracted to be built or constructed have not been completed, the completion thereof in the manner and according to the agreements and contracts, orders and resolutions as shown by [fol. 253] such minutes of the board and reports of commissioners, be, and it is hereby authorized, and said board is hereby fully authorized and empowered to pay therefor, as well as to pay for such work as may have heretofore been done, for which payment has not already been made.

Formation of Road Districts Confirmed and Ratified

Section 4. That the right and power of the board of supervisors to create the territory referred to in section one of this act into a separate road and taxing district, to issue bonds for and on behalf thereof, not in excess of any limitation of indebtedness imposed by law, and to levy and collect taxes upon all of the taxable property therein appearing upon the assessment rolls for state and county taxes, to

pay the principal of said bonds and the interest thereon at maturity, and to pay for the construction and maintenance of roads therein, be, and the same is hereby delegated, ratified and confirmed.

Powers of Board

Section 5. And the said boards of supervisors are hereby authorized and empowered to pass any and all orders, and to do any and all things deemed advisable by them, to validate any separate road and taxing district heretofore created and to validate the issuance of the bonds of said district, and to refund or pay such bonds or issue other bonds in lieu thereof, and to also validate any and all tax levies, contracts, and other things done by said board of supervisors in the creation of said district, the issuance and sale of the bonds, levying of taxes, and the building and maintenance of the roads in the said district or districts.

Tax Levies Ratified

Section 6. That whenever the board of supervisors in any county has heretofore levied a tax in any such district as is referred to in section one hereof for the purpose of paying bonds and interest and for the purpose of construct-
[fol. 254] ing or maintaining roads in said district its, acts, orders and resolutions in the levying and collection of said taxes are hereby approved, confirmed and ratified, and the power of the board of supervisors to levy a tax upon any or all taxable property located in said district in the future for the purpose of constructing or maintaining a road or roads therein, and of paying the bonds and interest therein, is hereby delegated confirmed and ratified.

Section 7. That any and all defects and omissions or irregularities if any, which occurred in the proceedings of the said board of supervisors with reference to the organization and creation of any such district as is referred to in section one hereof, and the issuance and sale of the bonds thereof and the making of orders, contracts and agreements for the construction or maintenance, or both, of roads therein, be, and the same are hereby in all respects cured.

Road District to Continue Until—When

Section 8. That any such district referred to in section one hereof shall continue to exist as a taxing district and road district of the state of Mississippi, under the provisions of the act or acts of the legislature under which it was attempted to be organized, and under the provisions of this act, until it shall be brought under the provisions of some other road law of the state by the board of supervisors of the county in the manner provided by law, and the board of supervisors of any county in which any such district is located shall have power to issue additional bonds for road purposes on behalf of said district in the manner provided by the general laws of Mississippi, and shall have power for the payment of said bonds and for the construction or maintenance, or both of roads therein to levy taxes upon any or all of the taxable property benefited assessed for state and county taxes in said district to an amount suffi- [fol. 255] cient for said purposes, and the power to levy such taxes is hereby expressly delegated to the board of supervisors.

Act Cumulative

Section 9. That this act is cumulative and is not in lieu of and shall not be construed to repeal any other act, either general or local, passed at this session of the legislature for the purpose of creating road districts or validating the bonds thereof, providing however, that this act shall not be construed as validating the expenditure of any money which may have been expended in violation of the terms of any act of the legislature under which the board may have been acting; nor shall it validate any contract, order or resolution in connection therewith where the board or commission was guilty of fraud or of a substantial departure from the provisions of such act of the legislature.

Section 10. If any clause, sentence, paragraph or part or parts of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidated the remainder of this act.

Section 11. That this act take effect and be in force from and after its passage.

Approved March 15, 1926.

[fol. 256] Mr. Magruder, on behalf of defendants, now introduces in evidence Chapter 1080 of the laws of 1926, which appeared originally as H. B. 1181, which was passed at a regular session of the Mississippi legislature held in the city of Jackson, commencing January 6th, 1926, ending March 19, 1926, printed by authority, and issued and approved by the Governor on the 11th day of March, 1926 and delivered to me by the Secretary of the State of Mississippi.

* * * * * * *

[fol. 257] Chapter 1080

An act to validate the organization of the "Oldham" Road District of Tishomingo County, Mississippi, to confirm the boundaries thereof, to validate the authorization, issuance and sale of certain road bonds thereof, to authorize the issuance of additional bonds thereof, and to provide for their payment.

Oldham Road District of Tishomingo County Validated

Sec. 1. Be it enacted by the Legislature of the State of Mississippi, That the Oldham Road District of Tishomingo County, Mississippi, having the following boundaries, to-wit:

Beginning at the center of section 20, township three, range 11, thence south to the southern boundary line of the Southern Railway right of way, thence in an easterly direction with the south line of the Southern Railway right of way to where said line intersects, the west line of section 33, township 3, range 11, thence with said line to southwest corner of said section 33, township 3, range 11, thence east to the southeast corner of section 34, township 3, range 11, thence north to the northeast corner of section 27, township 3, range 11, thence west to the northwest corner of section 28, township 3, range 11, thence north 160 rods to the northeast corner of the southeast quarter of section 20, township 3, range 11, the point of beginning. Being the same boundaries and including the same territory as when organized on the 1st day of February 1926, be the Board of Supervisors of said county, under the provisions of Chapter 277 of the laws 1920, and amendments thereto,

be and the same is hereby declared to be a valid road district of the said county under the provisions of said act, and the organization and creation thereof by the Board of Supervisors of said county is hereby ratified and confirmed, and the right and power of said Board of Supervisors to [fol. 258] create said territory into a separate road and taxing district, to issue bonds for and on behalf thereof, not in excess of any limitation of indebtedness imposed by law, and to levy and collect a direct, general ad valorem tax upon all the taxable property therein, appearing upon the assessment rolls for state and county taxes to pay the principal of said bonds and the interest thereon at maturity, be and the same is hereby delegated, ratified and confirmed, and that any and all bonds of said district which have heretofore been issued and delivered and are now outstanding, be and the same are hereby validated and declared to be the legal and binding obligations of said district.

Organization and Bonds Validated

Sec. 2. That any and all defects, omissions or irregularities which occurred in the proceedings of the said Board of Supervisors with reference to the organization and creation of said district, and the issuance and sale of the bonds thereof, be and the same are hereby in all respects cured.

Supervisors Empowered to Levy Taxes and Issue Bonds

Section 3. That said district shall continue to exist as a taxing district and road district of the state of Mississippi, under the provisions of said Chapter 277 of the laws of Mississippi, 1920, until it shall be brought under the provisions of some other road law of the state by the Board of Supervisors of said Tishomingo county in the manner provided by law, and the Board of Supervisors of said Tishomingo county shall have power to issue additional bonds for road purposes on behalf of said district in the manner provided by the general laws of Mississippi, and for the payment of said bonds said Board of Supervisors may levy annual general ad valorem taxes upon all of the taxable property assessed for state and county taxes in said dis- [fol. 259] trict to an amount sufficient for said purposes,

and the power to levy such annual general ad valorem taxes is hereby expressly delegated to said board of Supervisors and the funds so derived shall be used only for the construction and maintenance of roads in said district.

Sec. 4. That this act shall take effect and be in force from and after its passage.

Approved March 11, 1926.

* * * * * * *

[fol. 260] Defendants announced they would rest.

In Chancery Court of Tishomingo County

Opinion of the Court

Gentlemen: The case to be decided now before the Court, is a very grave matter; possibly the most important litigation that has been before a Mississippi Court in the present generation.

I think the proper thing is for the Court to state what his idea and findings are with reference to the facts in this case.

There has been a great deal of testimony in this case, since it has been sifted *u*own, which in my opinion, is utterly immaterial to the issues involved.

The Oldham Road District, as has been shown by the testimony, and Exhibits in this cause, contains apparently a small amount of improved roads, which is not parallel to the complaining railroad, but which is in the nature of a short lateral road. There can be no question in this law suit, under the proof in this case with reference to this particular District, of any competitive operation of the road in question and of the railroad. The road in question, in my judgment, has a tendency and will tend directly to slightly increase the revenues of the railroad, in that, it has opened up a small territory which has furnished and will probably continue to furnish a small amount; at least a comparatively small amount, of pulp-wood and timber for [fol. 261] shipment over the line of the railroad. I think the testimony in this case shows that indirectly, the road

will be of some considerable benefit to the railroad, in that it will have a tendency to settle labor conditions and aid in the operation of the two gravel pits within the district, which annually furnishes a large amount of tonnage for the complainant road.

That in my judgment, is a fair statement of the facts connected with the District, in so far as it touches the question of whether or not the railroad will be benefited directly, and in a sense, indirectly, by securing increased traffic, because of the location of this road.

When we get to the legal features of this law suit, there are some very troublesome questions involved in it, to my mind. I have studied carefully, the Archer County or Browning case, decided in the United States Supreme Court; having tried to analyze that case and apply the holdings of the Court to the facts in this case and to the Mississippi law, and I am of the opinion that the Browning case does not apply, either to the facts of this particular district, or to the Mississippi statutes. There is, to all intents and purposes, a finding of fact by the Supreme Court in the Browning case, that the property of the complainant parties received no benefit whatsoever from the organization of the road district. That I do not think is a fact in this case. I think there is a material difference in the Texas road law, which was condemned in that case, and the road law in Mississippi. According to the Texas law, as interpreted by the United States Supreme Court, the action of that County Board was purely ministerial; there was no discretionary power vested in them; no judicial power vested in them, but they must actually organize the district; must issue the bonds; provided a proper petition be filed and an election called, which resulted in favor of the bond issue.

[fol. 262] I do not so construe this Mississippi Statute. I think our Constitution and our Statute placed full power over roads, bridges and ferries in our Board of Supervisors, and my judgment is, that when a petition, seeking to have the creation of a road district, is filed by the required number of qualified electors, there still remains in the Board of Supervisors, the discretionary power to refuse to create that district, if in their sound judgment, that District should not be created.

There is also the right of appeal to the Circuit Court and from the Circuit Court, to the Supreme Court, from every action of our Boards of Supervisors, and in my judgment, those two conditions differentiate the Mississippi law and the facts in this case, from the law and facts as announced in the Browning case.

The argument of counsel for the complainant, that the District here in question, has issued in the aggregate, more than 15 per cent of bonds against its taxable valuation, is a persuasive argument, and was very forcibly presented, but I am of the opinion that the Supreme Court of Mississippi, has, in the case of Wright vs. the Board of Supervisors of Lauderdale County, 124 Miss. page 4, settled that question adversely to the contention of complainants in this case.

A still more persuasive argument was made by counsel for the complainant, that the immense amount of the assessment against the Railroad Companies for this type of improvement, was manifestly unfair and confiscatory and violates the Fourteenth Amendment to the Federal Constitution. However, I am of the opinion that the State Courts and the Federal Court, including the United States Supreme Court, have held that an ad valorum tax placed on all property in the district, was one of the fairest measures of ascertaining how taxes should be levied and collected for the majority of districts, such as the one in question, [fol. 263] and therefore I think that question is determined contrary to the p-sotion of complainant.

The question then arises as to whether or not the alleged failure on the part of the Board of Supervisors of Tishomingo County, to have the proof of publication of the notice of election on file with them when these orders were passed, would make this road district void. Granting, for the sake of argument, that this contention as to the fact, be true: I think the Legislature in the validating act, ratifying the proceedings of the Board of Supervisors in creating the Oldham Road District, could do in that validating proceedings, anything which they might have done lawfully in the beginning. I think that it was within the power of the Legislature of the State of Mississippi to have provided that it was not necessary to have on file, the proof of publication, but they might have provided that publication could be proven by other methods of proof, such as those

that have been introduced into this record this afternoon, and being of the opinion that they could have provided a different and specific method of proving this, I think they had power to ratify it.

With these views of the Court, it would necessarily follow, that complainant's bill would be dismissed.

Under these views, it is not necessary for me to determine the question of laches or estoppel, which was raised in this lawsuit, and this Court, therefore, says nothing about either of those questions and expresses no opinion on them, because the Court is of the opinion the suit is determined along other lines and on other issues.

[fol. 264] Reporter's certificate to foregoing transcript omitted in printing.

[fols. 265-267] Bonds on appeal for $900.00 and $500.00, approved and filed May 1, 1928, omitted in printing.

[fol. 268] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 269] In Chancery Court of Tishomingo County, in Vacation

Memphis & Charleston Railway Company, Complainants,

vs.

Omer J. Bullen, Sheriff & Tax Collector, et al.

Decree—Feb. 11, 1928

This cause come on for hearing in vacation by consent of all parties and in accordance with the court's former order on Original Bill with amendments thereto, answer and amended answer, fiat, bond, writ of injunction and all other papers and pleadings in said cause and on oral evidence, and the same being heard and well understood, said cause

shall be and is hereby di-missed at cost of Complainants, defendants being allowed all statutory damages on the bond therein.

Decree as aforesaid on this the 11th, day of February, 1928.

Allen Cox, Chancellor.

[File endorsement omitted.]

[fol. 270] In Chancery Court of Tishomingo County

Exhibit "FF" to O. J. Bullen's Testimony

Duplicate

No. 3389. $6,565.00.

State of Mississippi, Tishomingo County,

Office of County Depository, Iuka

Received of Iuka Guaranty Bk. the sum of Sixty-five hunderd sixty-five Dollars in full of Clerk's Receipt Warrant No. 876 dated f/10, A. D. 1926, in his favor, on account of Oldham Road Dist.

Given under my hand and seal this 10 day of May A. D. 1926.

(Signed) W. L. Weemer, County Depository.

Ex. FF. O. J. Bullen, F. Wylie. 2/10/28.

[fol. 271] Exhibit "E," O. J. Bullen's Testimony

State of Mississippi,
Tishomingo County:

Board of Supervisors, Nov. Term, 1926

Be it remembered that on Friday Nov. 5th, 1926, the same being one of the days of the regular term of said Board of Supervisors the following, among the proceedings was had and entered of record on the records of said Board, in words and figures following, to-wit:

	Mills
State Tax	6
General County Fund	6
County Roads and Bridge Redemption, Bonds & Int. Bridge	5
Bridge	2
County School (Outside Separate School District)	2
Agricultural High School	2
First District Road Fund	6
First District Road Maintenance	1
First District Roads Redemption Bond and Interest	8
Second District Road Funds	7
Burnsville Road Maintenance	1
Burnsville Road Redemption Bonds and Interest	7
Berea Road Maintenance	1
Berea Road Redemption, Bonds and Interest	9
Third District Road Fund	3
Fourth District Road Fund	3
Tishomingo Road Maintenance	1
Tishomingo Road Redemption Bond and Interest	10
Fifth District Road	3
Dennis Good Road Maintenance	1
Dennis Good Road Redemption, Bonds and Interest	3
Dennis Good Road Special Refunding	3½
[fol. 272] Belmont Road Maintenance	1
Belmont Road Redemption Bonds and Interest	7
Belmont Road Special Refunding	1½
Golden Road Maintenance	1
Golden Road Redemption Bonds and Interest	2½
Lee Highway Redemption Bonds and Interest	4
Paden Road Redemption Bonds and Interest	7
Doskey Road Maintenance	2
Doskey Road Redemption Bonds and Interest	14
Allen Line School Special Levy	30
Burton School, Redemption Bonds and Interest	3
Cotton Springs Incidentals	3
Oldham Road District Redemption Bonds and Interest	4
Pleasant Ridge School, Incidentals	2
Agricultural School Building Fund	2
Holcut Road Redemption Bonds and Interest	6
Burton Schools, Incidentals	2

	Mills
Dennis Schools Redemption Bonds and Interest	3
Dennis School Incidentals	6
Gravel Hill School Redemption Bonds and Interest	½
Gravel Hill School Incidentals	2
Holloway School Redemption Bonds and Interest	4
Holloway School Incidentals	1
Golden School Bonds and Interest	2
Golden School Incidentals	10
Lambert School Special Levy	1
Liberty School Incidentals	2
Martin School Incidentals	2
Midway Cons. School Redemption Bond and Interest	7
Midway Consolidated School Incidentals	2
Paden School Redemption Bonds and Interest	4
Paden School Incidentals	11½
[fol. 273] Pleasant Ridge Cons. School Bonds and Interest	2
Snowdown School Redemption Bonds and Interest	4
Snowdown School Incidentals	1
Tishomingo Con. School Redemption Bonds and Interest	3
Tishomingo Cons. School Incidentals	2
Valley School Redemption Bonds and Interest	8
Valley School Incidentals	2

State of Mississippi,
Tishomingo County:

I, T. J. Storment, Clerk of the Board of Supervisors of said county do hereby certify that the above is a true copy of an order made and entered of record on the day and year first above written as the same appears of record in Minute Book 8, page 370.

Given under my hand and official seal of said Board of Supervisors, at my office, this the 5th day of November, 1926.

T. J. Storment, Clerk.

STATE OF MISSISSIPPI,
Tishomingo County:

Total taxes levied in each Taxing District in Tishomingo County, Mississippi, for the year 1926, as follows to wit:

In First Supervisors District

	Mills
Iuka Separate School District	42
Iuka and Salem Precincts	44
Snowdown Cons. School District	49
Pleasant Ridge Cons. School	48
Oldham Road Snowdown School	53

[fol. 274] In Second Supervisors District

Burnsville Precinct	32
Burnsville Road District	44
Berea Road District (in second district)	42
Doskey Road District	48
Gravel Hill School (in Burnsville road district)	46½
Gravel Hill School (in Berea Road District)	44½
Holloway School District	49
Lambert School (in Doskey Road District)	50
Lambert School (in Burnsville Road District)	46
Pleasant Ridge School (in Burnsville Precinct)	36
Pleasant Ridge School (in Burnsville Road District)	48

In Third Supervisors District

Third District Road District	28
Berea Road District (in third district)	38
Holcut Road District	34
Liberty School District	36
Holloway School, Doskey Road	53
Martin School District	30
Midway Cons. School District Holcut Road	43
Pleasant Ridge Consolidated School (third District)	38
Paden Cons. School (in third District)	43½

In Fourth Supervisors District

Paden Precinct	28
Paden School district (outside Paden Road district).	43½

	Mills
Paden road district and school	50½
Burton school	33
Tishomingo road district	39
[fol. 275] Tishomingo road and school district	44
Dennis school (in fourth district)	37
Valley school (in fourth district)	38

In Fifth Supervisors District

Golden and Cotton Springs precincts	28
Belmont separate school district	35½
Belmont road district (outside Belmont S. S. district)	37½
Dennis road district (outside Dennis School district)	35½
Golden school and road district	43½
Allen Line school district	58
Valley school (in Belmont road district)	47½
Valley school (in Golden road district)	41½
Cotton Springs school	31
Cotton Springs school, Belmont road	40½

Ex. "E." O. J. Bullen, F. Wylie. 2/10/28.

[fol. 276] EXHIBIT F TO TESTIMONY OF O. J. BULLEN

Schedule or roll of assessments of Memphis & Charleston Railway Company in Tishomingo County, State of Mississippi, for taxes due the municipalities and districts named below, in said county, and due said county, as indicated below, on property owned by said company therein on the first day of February, 1926, to wit:

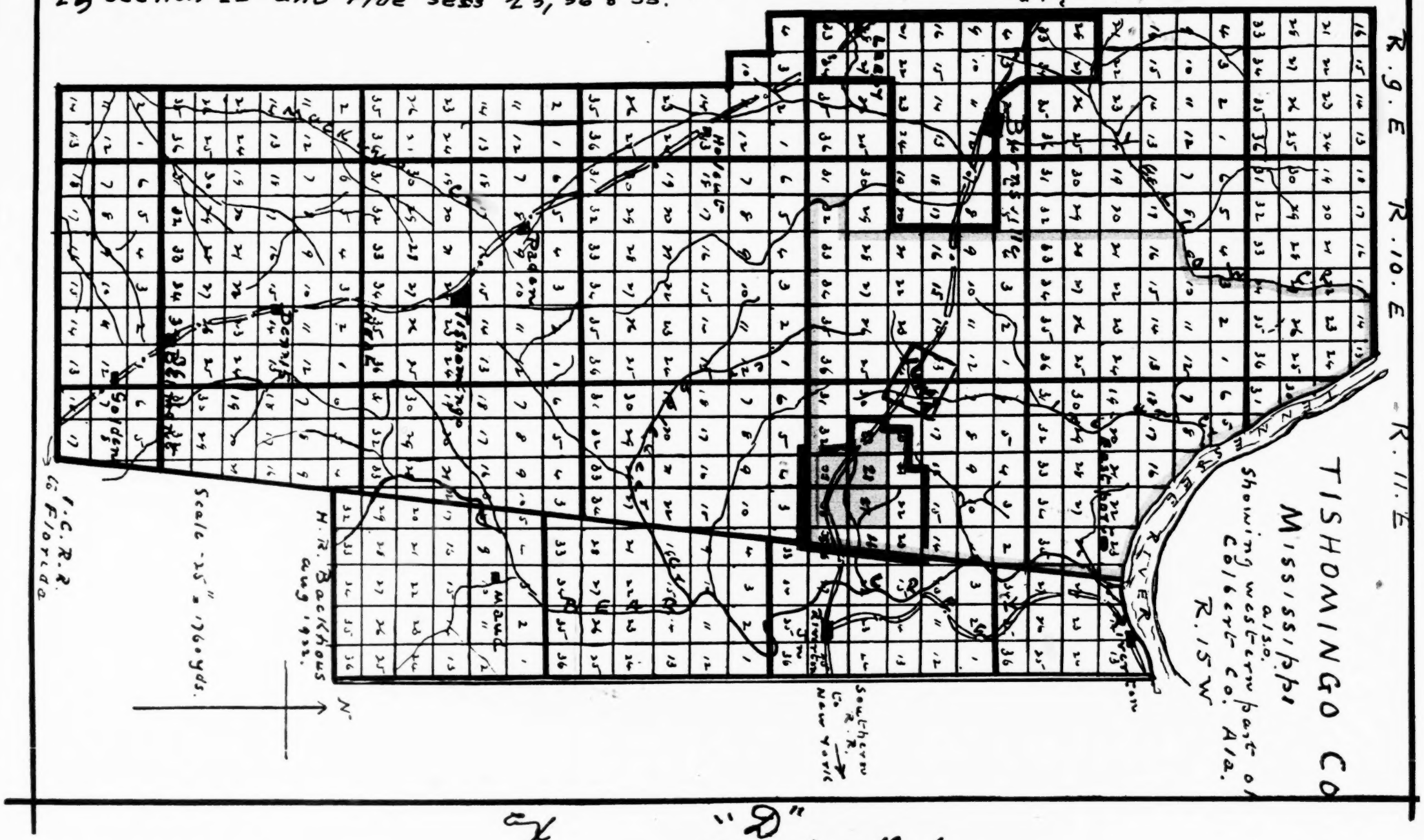
Municipalities	Location	Valuation by Tax Com.	Valuation by taxpayer	First main track, valuation per mile $35,000 Miles	First main track, valuation per mile $35,000 Val.	2nd main track val. per mile	Side track, valuation per mile $4,500 Miles	Side track, valuation per mile $4,500 Value	Valuation of real estate	Valuation of other property
Supervs. Dist. No. 1:										
Oldham Road District	Mile 432-A	5,175	....	....	.....	....	1.15	5,175	...	....
	Gravel Siding.	7,005	....	....	.....	....	1.54	6,930	...	75
	Mile 431.8-A	120	....	....	.....	....	....	....	120	....
	Mile 431.2-A	100	....	....	.....	....	....	....	...	100
Outside	.....	100,800	....	2.88	100,800	....	....	....	...	....
Total Oldham Road District		$113,200								
Outside Oldham Road District	Mile 431.3-A	5,400	....	....	.....	....	1.20	5,400	...	....
Town of Iuka	.....	63,625	....	1.57	54,950	....	1.08	4,860	280	3,535
	Mile 437.9-A	260	....	....	.....	....	....	....	60	200
Outside cities, towns and villages	.....	190,750	....	5.45	190,750	....	....	....	...	....
Total Outside Oldham Rd. Dist.		$260,035	....	....	.....	....	....	....	...	....
Total Supervisors Dist. #1		$373,235	....	....	.....	....	....	....	...	....
Supervs. Dist. No. 2:										
Burnsville Road Dist.	Walkers Switch Mile 444 (Part Burnsville Pass. Track.	855	....	....	.....	....	.19	855	...	....
		540	....	....	.....	....	.12	540	...	....

704

Boundaries of 1st. Supervisors District Shown outlined in Light Red.
" " Burnsville Road District " " " Dark Red.
" " Oldham " " " Colored Solid Orange.

LEE HIGHWAY DISTRICT is Comprised of Entire first District and Entire Burnsville Rd. Dist.

Boundaries of Snowdown School District shown Oothmod Green.
Snowdown School Dist. embroces all of Oldham Road District
and in Addition all Remainder Sec. 29, 3 quarters of Sec.
27 Section 22 and Froe sess 23, 36 & 35.



Ex "D"
2/10/28 O. J. Sallee
F Wylie Shaw

20 21 22

29 28 27

32 33 34

TO TUPELO

TO RIVERTON JCT

FREE BRIDGE ROAD

SNOWDOWN SCHOOL

GRAVEL SIDING ROAD

GRAVEL SIDING, MISS.

ALLEN GRAVEL COMPANY

MEMPHIS STONE & GRAVEL COMPANY

OLDHAM ROAD

LEE HIGHWAY

CLEAR CREEK

OLDHAM, MISS.

MISSISSIPPI ALABAMA

D434-A

D433-A

D432-A

D431-A

EX. A.
E.S. DAVIS
F. WYLIE
2/10/28

NOTE -

ROADS BUILT BY COMMISSIONERS OLDHAM ROAD DISTRICT SHOWN	RED
OLDHAM ROAD DISTRICT SHOWN	ORANGE
LEE HIGHWAY SHOWN	YELLOW
FREE BRIDGE ROAD SHOWN	GREEN

TRACKS OF MEMPHIS & CHARLESTON RAILWAY COMPANY IN OLDHAM ROAD DISTRICT

MAIN TRACK 3.88 MILES SHOWN	BROWN
SIDE TRACK .43 MILE (CLEARANCE) SHOWN	BROWN

MAIN TRACK RIGHT OF WAY — 51.83 ACRES
SECTION HOUSE LOT — 5.98

SOUTHERN RAILWAY COMPANY.
OFFICE OF ENGR. M. OF W. MEMPHIS CMS DISTRICT

OLDHAM ROAD DISTRICT OF TISHOMINGO COUNTY MISSISSIPPI.

SCALE 1-4000 C.50 JAN 21, 1928

X-11-736

Town of Burnsville.....	.....	40,575	....	1.00	35,000	....	.86	3,870	420	1,285
[fol. 277] Mile	446.8-A..	360	....	....	.....	....	....	....	60	300
Outside cities, towns and villages	.....	213,500	....	6.10	213,500	....	....	....	...	....
Total Supervisors Dist. #2.....		$255,830								
Total for County		629,065	....	17.00	595,000	....	6.14	27,630	940	5,495

First Main Track, includes value of Waylands, Station Grounds, Yards, Road Bed, Bridges, Rolling Stock, Block System, Telephone and Telegraph Lines, and Franchise.

Ex. "F." O. J. Bullen, F. Wiley. 2/10/28.

(Here follow maps, side folio pages 277½ and 277¼)

[fol. 278] IN SUPREME COURT OF MISSISSIPPI

27496

MEMPHIS & CHARLESTON RAILWAY COMPANY, Appellant

vs.

OMER J. BULLEN et al., Appellees

ASSIGNMENTS OF ERROR

The appellant assigns the following errors to the judgment of the Court below:

I

The Court erred in permitting the witness Sam Allen to testify to the amount of gravel the Memphis Stone & Gravel Company shipped in 1927 (Record 219).

II

The Court erred in not excluding the evidence of the witness Sam Allen as to the amount of revenue the appellant received from shipments of gravel from the two gravel companies (Record 222).

III

The Court erred in permitting the witness L. T. Gaines to testify from the books of the County depository, which were kept by Mr. McRae, as to the disbursements of the Oldham Road District, when the books showed the items were made up from warrants of said district (Record 242).

IV

The court erred in refusing to allow the witness Ligon to testify why he made the boundary line of Oldham Road District through Section 29 along the south boundary of the right-of-way of the Memphis & Charleston Railway Company (Record 284).

[fol. 279] V

The Court erred in permitting the witness O. J. Bullen, Chancery Clerk, to testify as to the notice of the election

given by the election commissioners to issue bonds of Oldham Road District from the three issues of "The Vidette" in his office and one issue of "The Vidette" from the files of "The Vidette" (Record 293).

VI

The Court erred in permitting the witness A. I. Dorsey to testify that A. K. Tigrett & Company was an innocent purchaser without notice of the Six Thousand Dollars of bonds of the Oldham Road District (Record 304-305).

VII

The Court erred in dismissing appellant's bill and in failing to enjoin the taxes as prayed for in said bill, because the election commissioners failed to file with the Board of Supervisors proof of publication of notice of an election for the issuance of $6,500 worth of bonds of Oldham Road District (Record 216).

VIII

The Court erred in dismissing appellant's bill and in failing to enjoin the taxes as prayed for in said bill, because the Board of Supervisors of Tishomingo County had no jurisdiction to organize said Road District without proof of publication of notice of the election given to the qualified electors of said District, at the time the report of the election commissioners was filed with said Board (Record 216).

IX

The Court erred in dismissing appellant's bill and in failing to enjoin the taxes as prayed for in said bill, because the Road Commissioners of said Road District and the Board of Supervisors of Tishomingo County failed to em-[fol. 280] ploy a competent civil engineer to lay out the roads in said District and to make an estimate of the cost of constructing and maintaining such highway, or highways, for each separate mile covered by such survey. No such report was filed with the Board of adopted by them, and no such report was spread on the Minutes of the Board, nor spread on the Minutes adopting said survey, estimate

and report, as required by Section 5, Chapter 277, Laws of 1920.

X

The Court erred in failing to hold the assessment against the appellant void and in dismissing its bill, for the reason that the bonds issued by the Board of Supervisors constituted an amount thereof in excess of 15 per cent of the assessed valuation of all taxable property of the Oldham Road District, and because road bonds had theretofore been issued to an amount exceeding 15 per cent of the assessed valuation of such district prior to the organization thereof, in violation of the provisions of Section 3, Chapter 277, Laws of 1920.

XI

The Court erred in failing to hold that Chapter 277, Laws of 1920, is unconstitutional and void, and that the assessment against appellant, made pursuant to the organization of the Oldham Road District, organized under and pursuant to the provisions of said law, is unconstitutional and void, in that the same takes appellant's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, no notice or right to hearing having been afforded to appellant under the provisions of said law, nor having actually been afforded to the appellant prior to the assessment having become fixed and a lien upon its property.

XII

The Court erred in failing to hold that Chapter 277, Laws [fol. 281] of 1920, is unconstitutional and void and that the assessment against the appellant made pursuant to the provision thereof is unconstitutional and void, in that the same takes appellant's property without due process of law and denies appellant the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, in that, under the terms thereof, it imposes special benefit taxation upon all property, personal as well as real, within the boundaries of a road district organized thereunder, not in proportion to the specific benefits to such property, but on the basis of

the valuation thereof for general purposes of taxation, which is itself arbitrary, and, in any event, the personal property therein not being benefited at all by the local improvement.

XIII

The Court erred in failing to hold that Chapter 1080, Local and Private Laws of 1926, which purported to validate the bond issue by the Oldham District, is itself unconstitutional and void:

(a) In that it is violative of Article 4, Sections 80, 87, and 88, and Section 90, subdivisions (g), (l), and (r), of the Constitution of Mississippi of 1890; and

(b) In that it takes appellant's property without due process of law and denies appellant the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, in attempting retroactively to do away with the necessity for notice and a right to hearing, to which complainant is entitled in conformity with due process of law; and

(c) In that it imposes special benefit taxes upon all property, personal as well as real, within the boundaries of the District therein created, not in proportion to the specific benefits to such property, but on the basis of the valuation [fol. 282] thereof for general purposes of taxation, which is itself arbitrary, and in any event the personal property therein not being benefited.

XIV

The Court erred in failing to hold that the assessment attacked is so plainly and palpably arbitrary, and is so grossly excessive in amount, and is so unreasonably discriminatory, and is such a plain abuse, that it denies to appellant the equal protection of the law and takes appellant's property without due process of law, contrary to Article 3, Section 14, of the Constitution of Mississippi of 1890 and to the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted.

(Signed) S. R. Prince, Ely B. Mitchell, John B. Hyde, Attorneys for Appellant.

I, John B. Hyde, one of the Counsel for Appellant, do hereby certify that I have this day deposited in the United States Postoffice at Washington, District of Columbia, in envelopes, sealed, bearing sufficient postage, and addressed to Appellees' Attorneys of Record, Mr. J. A. Cunningham and Mr. W. W. Magruder, at their respective places of residences and postoffice addresses, Booneville, Prentiss County, and Starkville, Oktibbeha County, Mississippi, respectively, true copies of the foregoing assignments of error.

Witness my hand at Washington, District of Columbia, this 8th day of November, 1928.

(Signed) John B. Hyde, of Counsel for Appellant.

[fol. 283] Order of submission December 3, 1928, omitted in printing.

[fol. 284] In Supreme Court of Mississippi

27496

Memphis & Charleston Railway Co.

vs.

Omer J. Bullen, Sheriff & Tax Collector

Judgment—Dec. 22, 1928

This cause having been submitted on a former day of this term on the record herein from the Chancery Court of Tishomingo County and this court having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order, adjudge and decree that the decree of said Chancery Court, rendered in this cause on February 11th, 1928 be and the same is hereby affirmed and that the appellee do have and recover of and from the appellant and Ely B. Mitchell and L. B. Mitchell, sureties in the appeal bond the costs of this cause in this court and in the court below to be taxed.

[fol. 285] IN SUPREME COURT OF MISSISSIPPI

Division B, Anderson, J.

[Title omitted]

OPINION—Filed Dec. 22, 1928

Appellant filed the bill in this case against appellees, the members of the Board of Supervisors of Tishomingo County and Omer J. Bullen, Sheriff and Tax Collector of that County, to enjoin the former from levying, and the latter from collecting, an ad valorem tax on the taxable property of the appellant in the Oldham Road District. A temporary injunction was issued and served in accordance with the prayer of the bill. There was a trial on bill, answer, motion to dissolve the injunction, and proof, resulting in a final decree dissolving the injunction, and dismissing appellant's bill. From that decree, appellant prosecutes this appeal.

The Oldham Road District was organized under Chapter 277, Laws of 1920. Appellant contends that the manner of the organization and establishment of road districts under the provisions of that Chapter deprives property owners of such districts not petitioning therefor of due process, in violation of the due process clause of the 14th Amendment to the Federal Constitution; and, to maintain that position, appellant relies on Browning v. Hooper, 269 U. S. 396, 70 L. Ed. 330. The Texas statute under consideration in that case conferred power on the property owners petitioning for the organization of the road district to arbitrarily fix, [fol. 286] in their petition, the territory to be included in the district, and, therefore, the property to be taxed. The Supreme Court held that that was one of the essential elements which determined the burden to be borne by the tax payers of the district, and that it was essential to due process of law that the property owners be given an opportunity to be heard on that question.

Section 2, Chapter 277, Laws of 1920, provides as follows:

"That upon presentation to the board of supervisors of any county of a petition containing the names of 20 per

cent of the qualified electors of any one or more supervisors districts of any territory proposed to be created and organized into a road district of such county asking that such district or districts or territory be permitted to come under the provisions of this act, it shall be the duty of such board of supervisors to order an election to be held on a day to be fixed by them submitting the proposal to issue bonds of such district or districts to the qualified electors of such district or districts and the election commissioners of such county, shall give notice of such election to issue such bonds by publication in a newspaper published in the county having a general circulation therein, and if none be therein published, then in some newspaper having a general circulation therein, published elsewhere, for three successive weeks, which said election shall be held and be conducted according to the provisions of the chapter on 'registration and elections' of the Code of 1906, so far as applicable; the tickets to be used in such election to contain the [fol. 287] following, 'For the issuance of bonds', and either below or above it, in the ticket, 'Against the issuance of bonds.'"

Appellant contends that that section of the statute provides substantially the same scheme for the organization and establishment of Road Districts as the Texas statute did that was condemned by the Supreme Court of the United States in Browning v. Hooper, supra. The view we take renders it unnecessary to decide this question, for we are of the opinion that if it be true that Chapter 277, Laws of 1920, violates the due process clause of the 14th Amendment, as construed in Browning v. Hooper, nevertheless, the establishment and organization of the road district involved, the issuance of bonds therefor, as well as the other acts and things done in pursuance of the statute, were validated by Chapter 278 of the laws of 1926, Secion 8547, Hemingway's 1927 Code. That statute validates all road districts theretofore organized under any road laws of the State, and provides that the bonds issued for such districts shall be legal, and that all acts and resolutions of the Boards of Supervisors done and passed in pursuance of any such statute, as well as all levies of taxes on the property of such districts, under the provisions of any such law, shall be

valid. Before the passage of Chapter 278, Laws of 1926, and at the same session of the Legislature, Chapter 1080, Laws of 1926, was adopted. The latter was a *ps*ecial and local Act applying alone to the particular road district involved. The title to the Act fairly *prot*rays its purpose, which is; "An Act to validate the organization of the 'Oldham' Road District of Tishomingo County, Mississippi, to confirm the boundaries thereof, to validate the authorization, issuance and sale of certain road bonds thereof, to authorize the issuance of additional bonds thereof, and to provide for their payment." Section 1 of Chapter 278, [fol. 288] Laws of 1926, provides as follows:

"That in cases where the board of supervisors of any county in this state has organized or attempted to organize a road district under the provisions of the statutes of this state, where the creation of such district or the issuance of the bonds thereof, has been validated or attempted to be validated by any statute enacted during the 1926 session of this legislature, such district, with the boundaries set forth and described in the minutes of the Board of Supervisors, or set forth and described in any Act passed at this session of the legislature, be, and the same is hereby declared to be a valid road district of such county, and the organization and creation, and all orders, resolutions and proceedings of the Board of Supervisors, in connection with such or/anization and creation, be and they are hereby confirmed and ratified."

It will be seen from these two statutes that the Legislature attempted to validate the road district involved and the bonds issued therefor, first by a local Act specifically describing the boundaries of the district, and then by a general Act, made applicable to all road districts in the State, regardless of what Statute they were organized and established under. If the Legislature had delegated to the Boards of Supervisors the legislative authority to establish road districts in their counties, fix the boundaries thereof, and prescribe the amount of bonds to be issued for such districts and levy the necessary ad valorem tax with which to pay the bonds and maintain the roads of the district, without an opportunity of hearing on the part of the property owners of the district, and without an election on the

[fols. 289 & 290] question whether the bonds should be issued or not, such a Statute would not have violated the due process clause of the 14th Amendment to the Federal Constitution. Browning v. Hooper, supra; Valley Farms Co. v. Westchester, 261 U. S. 155, 67 L. Ed. 585, 43 Sup. Ct. Rep. 261; Hancock v. Muskogee, 250 U. S. 454, 63 L. Ed. 1081, 30 Sup. Ct. Rep. 528; St. Louis and S. W. Ry. Co. v. Nattin, 72 U. S. —, 72 L. Ed. 830, and Swayze v. Hattiesburg, 147 Miss. 246, 111 So. 818. In other words, if Chapter 277 of the laws of 1920, instead of the scheme therein set out for the organization and establishment of road districts, had conferred on the Boards of Supervisors the legislative authority to organize and establish road districts as just above set out, clearly, under the cases cited, the Statute would not have contravened the due process clause of the 14th Amendment.

Appellee's contention is that each of these statutes validated the road district involved and the bonds issued therefor. The Court is not in agreement as to whether the local and special Act violates Section 90 of our Constitution, but is in agreement that there is no constitutional objection to Chapter 278, Laws of 1926, and that the district and its bonds were validated by that Act, for the reasons given, which we will undertake to state again in a very brief manner. Under the 14th Amendment, the Legislature of a State may directly, by a legislative act, select and lay out local improvement districts and spread the costs of their improvement over the property of the districts in the form of taxes, or the Legislature may delegate that authority, (which is legislative authority) to the governing body of each County. Concede that such authority was not conferred on the Boards of Supervisors by Chapter 277, Laws of 1920, still, it was accomplished by the curative Act (Chap- [fol. 291] ter 278, Laws of 1926).

It is beyond question that the Legislature has the power, under the Constitution, to validate the bonds issued by any political subdivision of a State which it could have previously, constitutionally, authorized. Griffith v. Vicksburg, 102 Miss. 1, 58 So. 781; Bacot v. Hinds County, 124 Miss. 231, 86 So. 765; Parker v. Grenada County, 125 Miss. 617, 88 So. 172; Railway Co. v. Burns, 148 Miss. 7, 113 So. 908; Von Zondt v. Braxton, 149 Miss. 461, 115 So. 557,

We are of the opinion that the other contentions of appellant are without merit, and are not sufficiently grave to call for discussion by the Court.

Affirmed.

[File endorsement omitted.]

[fol. 292] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

ORDER GIVING FIFTEEN DAYS' ADDITIONAL TIME TO FILE SUGGESTION OF ERROR—Jan. 7, 1929

Ordered that fifteen days additional time be allowed in which suggestions of errors may be filed by both appellant and appellee.

IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

SUGGESTION OF ERROR OF APPELLANT—Filed Jan. 14, 1929

Comes the appellant, on this 10th day of January, 1929, within the time allowed by the rules of the Court and the extension thereof, heretofore allowed by the Court on January 5, 1929, and respectfully suggests that the Court erred, as a matter of law, in its decision rendered herein on December 22, 1928, in the following particulars, to-wit:

I

In failing to hold specifically that the special validating [fol. 293] act, Chapter 1080, Laws of 1926, is unconstitutional and void, under Article 4, Sections 80, 87, and 88, and Section 90, subdivisions (g), (l), and (r), of the Constitution of Mississippi of 1890.

II

In failing to hold that the general validating act, Chapter 278, Laws of 1926, is likewise unconstitutional and void,

under Article 4, Sections 80, 87, and 188, and Section 90, subdivisions (g), (l), and (r), of the Constitution of Mississippi of 1890, in so far as the said general act attempts to validate the organization of the Oldham Road District and by reference to its boundaries, can be construed to refer to and to attempt to ratify and validate the same.

III

In failing to hold that both Chapter 278 and Chapter 1080, Laws of 1926, since they cannot be construed to apply specifically and specially to the Oldham Road District, because of the aforesaid prohibitions of the Mississippi Constitution, are ineffectual to constitute the legislative determination necessary to impose a valid assessment on appellant's property in accordance with due process of law, guaranteed by the Fourteen- Amendment to the Constitution of the United States.

IV

In failing to hold that both Chapter 278 and Chapter 1080, Laws of 1926, are unconstitutional and void, as violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that the legislature is without power retroactively to do away with the necessity for notice and a right to hearing.

Argument

I

Appellant earnestly insists that Chapter 1080, Laws of [fol. 294] 1926, is violative of the Mississippi Constitution in the particulars shown in the assignments of error filed herein on November 10, 1928, and respectfully submits that it is entitled to a decision on this point in its favor, on which point the opinion of the Court, filed herein on December 2*d*, 1928, states that this Court was then divided.

II

Now, if the special validating act be thus violative of the Mississippi Constitution, it follows that the general act,

Chapter 278, Laws of 1926, is likewise invalid in so far as the Oldham Road District is concerned, on the same grounds, for it necessarily refers to, and relies for validity upon, the special act.

Section 1 provides:

"Be it enacted by the Legislature of the State of Mississippi, That in cases where the board of supervisors of any county in this state has organized or attempted to organize a road district under the provisions of the statutes of this state, *where the creation of such district or the issuance of the bonds thereof has been validated or attempted to be validated by any statute enacted during the 1926 session of this legislature*, such district with the boundaries set forth and described in the minutes of the board of supervisors or set forth and described in any act passed at this session of the legislature, be, and the same is hereby declared to be a valid road district, of such county, and the organization and creation and all orders, resolutions and proceedings of the board of supervisors in connection with such organization and creation, be, and they are hereby confirmed and ratified." (Italics ours.)

Chapter 278, Laws of 1926.

[fol. 295] Now, if the legislature cannot directly create, ratify and confer special powers upon the Oldham District, it cannot do so indirectly by passing a void special act, and they by reference thereto be held to have thus specially validated a special district by means of an act general in form.

For example, the Mississippi Constitution of 1890, in the sections cited above, prohibits the creation of private corporations by special laws. Assume that the legislation attempted to create by special separate acts the A Company, the B Company, and the C Company, and at the same session passed an act in general form declaring that all corporations created or attempted to be created during this session be, and they are hereby, validated, etc. Could it be said that the general act as applied to any one of the separate corporations did not likewise offend against the constitutional prohibition?

Appellant respectfully submits that Chapter 278, Laws of 1926, is likewise void under the Mississippi Constitution as applied to the Oldham Road District.

III

Appellant submits that, the creation or validation of the Oldham Road District being prohibited by the Constitution of Mississippi either by a special act or by an act in general form construed to apply to that district, and both Chapter 1080 and Chapter 278, Laws of 1926, thus being void, there has been no legislative determination fixing the basis and amount of the tax attempted to be imposed, and that the assessment imposed under the machinery of Chapter 277, Laws of 1920, is wanting in due process of law, under the Fourteenth Amendment, as construed in Browning v. Hooper, 268 U. S. 396, 70 L. ed. 330.

To state this concretely, the proposition is:

A property owner is entitled to notice and hearing (either [fol. 296] in a so-called "ad valorem" district or in a so-called "benefit" district), unless the legislature itself (or its fully empowered political agency) has fixed the boundaries of the district and the basis of the assessment. Now, this Court has assumed, in its decision of December 23, 1928, that, in the original act, Chapter 277, Law of 1920, the legislature neither itself created the district nor clothed a recognized political subdivision with the requisite full legislative power. Since, therefore, the attempted express determination of the legislature in the special act relative to the Oldham Road District is void as special legislation, and since the general determination as expressed in the blanket validating act is ineffectual unless it be construed to apply to the Oldham District, and if construed so to apply to the Oldham District it is likewise void as special legislation, it results that there has never been a legislative determination fixing the boundaries of the district and determining the basis of the assessment. Hence the assessment imposed by Chapter 277, Laws of 1920, is wanting in due process of law and violates the Fourteenth Amendment.

IV

Appellant respectfully suggests, as its final point, that even if the validating acts, Chapters 278, and 1080, Laws of 1920, or either of them, should be held valid as special legislation under the Mississippi Constitution, they nevertheless cannot be held sufficiently to satisfy the due process

of law, in that they attempt to do away retroactively with the notice and hearing which appellant is guaranteed by the Fourteenth Amendment. Many cases are found which state in general terms that what the legislature can authorize it can ratify, and they hold that mere irregularities (but not constitutional limitations) can be cured by validating legislation, but none of them go to the length of holding that a [fol. 297] proceeding void for want of jurisdiction of the person can be afterwards validated. This right to notice and a hearing is as fundamental and the same as is the right to service of process, and appellant submits that neither the special validating act nor the general blanket endorsement of the legislature, both of them passed after the bonds had been sold, could, consistently with due process of law, do away with this right. In this view, all of the laws, Chapter 277, Laws of 1920, and Chapters 278 and 1080, Laws of 1926, violate the Fourteenth Amendment and are void.

Conclusion

In pointing out the above suggestions of error, appellant does not waive, but earnestly insists upon, all of its other assignment of error, filed herein on November 10, 1928, and asks for a reconsideration of the entire case in the light of the matters urged in the original briefs and stated herein, particularly insisting that the assessment imposed upon it pursuant to Chapter 277, Laws of 1920, is such a plain abuse and is so palpably arbitrary that it offends against both the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Wherefore appellant prays for a reconsideration of the case and that this Court hold said laws and the assessment thereunder void.

This 10th day of January, 1929.

Respectfully submitted.

(Signed) S. R. Prince, Ely B. Mitchell, J. B. Hyde,
Attorneys for Appellant.

I, John B. Hyde, one of Counsel for Appellant, do hereby [fol. 298] certify that I have this day deposited in the United States Postoffice at Washington, District of Colum-

bia, in envelopes, sealed, bearing sufficient postage, and addressed to Appellees' Attorneys of Record, Mr. J. A. Cunningham and Mr. W. W. Magruder, at their respective places of residence and postoffice addresses, Booneville, Prentiss County, and Starkville, Oktibbeha County, Mississippi, respectively, true copies of the foregoing Suggestion of Error.

Witness my hand at Washington, District of Columbia, this the 10th day of January, 1929.

(Signed) John B. Hyde, of Counsel for Appellant.

[File endorsement omitted.]

In Supreme Court of Mississippi

[Title omitted]

Suggestion of Error of Appellees—Filed Jan. 19, 1929

With all possible deference to the Supreme Court, counsel for appellees deem it advisable to submit for the con-[fol. 299] sideration of the Court certain observations with reference, not so much to the Court's decision proper, but to the Court's opinion, believing that some little modification and clarification of such opinion is of great importance to appellees, involving also grave questions of public policy as to the constitutionality in general of Road Bonds issued by the various Road Districts of the State under the laws of 1920, as validated by the special acts of 1926.

Our Suggestion of Error may therefore be considered rather as a motion or suggestion for the modification of the Court's opinion than as a statement or suggestion of error in the decision itself.

Under the procedure employed by appellant in the instant cause from its inception, the evident railroad purpose is to attack in the Supreme Court of the United States the statutes of Mississippi by a test case from a small and comparatively unimportant road district, involving bonds only in the sum of $6,500.

Such evident purpose demands every possible precaution for the protection of this small bond issue in the Supreme

Court of the United States, in which tribunal, an adverse decision to the validity, and constitutionality of such district and its bonds might result in the most disastrous consequences to the credit and honor of our commonwealth and the political sub-divisions thereof.

If Chapter 277, Laws of 1920, is unconstitutional under the decision of the Supreme Court in Browning et al. vs. Hooper, 269 U. S. 396, the sooner we know it the better.

If Chapter 1080 and approximately five hundred similar acts of 1926 are in violation of the Constitution of our own State, the sooner we know that, the better.

We are confronted in this case with two propsoitions:

First. The Supreme Court of the State of Mississippi declines to pass on the validity and constitutionality of Chap-
[fol. 300] ter 277, Laws of 1920, under which statute and other preceding statutes of the same character, negotiable bonss have been issued and sold in an aggregate sum estimated at fifty million dollars, or perhaps more than that.

Second. The Supreme Court of Mississippi declares its own disagreement as to whether or not five hundred special acts of 1926 for the validation of road bonds are in conflict with Section 90 of Mississippi's own Code and Constitution.

Of course, no decision that this Court can render will militate in the slightest degree against the jurisdiction and authority of the Supreme Court of the United States under the Fourteenth Amendment to the Federal Constitution; but if the Supreme Court of Mississippi declines to approve the constitutionality of its own statutes, under its *our* con-s-itution, appellant will certainly place the most sinister emphasis on such situation, in the tribunal of last resort.

The construction of the Mississippi Supreme Court on the statutes of its own state will control the construction of such statutes by the Supreme Court of the United States, except of course that such tribunal of last resort will not thereby be precluded from the adjudication of independent Federal questions arising under the due process clause of the Fourteenth Amendment.

We respectfully call to the Court's attention certain language of the original opinion in this case; and we do this in order to emphasize the sinister implications which ap-

pellant will urge in the Supreme Court of the United States against such opinion.

For instance, the Court says:

"*If* the Legislature *had* delegated to the Board of Supervisors the legislative authority to establish road districts in their counties, fix the boundaries thereof, and prescribe the amount of their bonds to be issued for such districts, and levy the necessary ad valorem tax with which to pay [fol. 301] the bonds and maintain the roads of the district, without an opportunity of hearing on the part of the property owners of the district, and without an election on the question whether the bonds should be issued or not, such a statute would not have violated the due process clause of the 14th Amendment to the Federal Constitution." (Italics ours.)

This statement in such opinion will undoubtedly be used by appellant and perhaps by other litigants in similar cases in an effort to demonstrate in the Supreme Court of the United States that this tribunal believes Chapter 277, Laws of 1920, to be an invalid and unconstitutional statute.

We further submit that such language may be construed to place the organization of road districts in the State under Chapter 277, Laws of 1920, on a different basis from that which has been declared by the Supreme Court of the United States to be the correct construction of powers granted by the Legislature of the State of Louisiana to its Police Juries corresponding to our Boards of Supervisors, St. Louis v. Southwestern Railway Company vs. Nattin, — U. S. —, 72 L. Ed. 541.

When properly compared and analyzed, the powers of a Board of Supervisors under the statute of Mississippi are substantially the same, if not absolutely identical, in legal effect with the statutory authority of Police Juries in the State of Louisiana.

We further call attention to the fact that other language in the Court's opinion will certainly be used by appellant in the Supreme Court of the United States in an effort to demonstrate that the statutes of this State are similar, if not identical, in legal effect, with the statutes of Texas condemned in Browning v. Hooper, 269 U. S. 396, 70 L. ed. 330, as follows, to-wit:

"The Texas statute under consideration in that case con-
[fol. 302] ferred power on the property owners petitioning for the organization of the road district to arbitrarily fix, in this petition, the territory to be included in the district, and, therefore, the property to be taxed."

That the Mississippi Road Districts are organized under a statutory system clearly differentiated from that condemned by the Supreme Court of the United States in the Archer County case must be evident, when we consider Section 170 of the Mississippi Constitution, which for all practical purposes confers unlimited power upon Boards of Supervisors, over roads, ferries and bridges. Robertson vs. LeFlore County, 112 Miss. 54, 72 So. 852.

We must also consider and understand that the powers conferred by the road district statutes of Mississippi, and particularly by Chapter 277, Laws of 1920, clearly indicate the legislative purpose to create subsidiary political subdivisions of the State for a great governmental purpose, viz: the construction of roads, upon which the welfare of the body politic depends; and especially so when even a cursory glance at such legislation clearly demonstrates that it is the purpose of the legislature to confer upon these governmental sub-divisions the power of general taxation or ad valorem taxation as distinguished from the power to lay special assessments or benefits.

In this connection we take the liberty of calling to the Court's attention State ex rel. Road District vs. Thompson, 315 Mo. 56, 285 S. W. 57, in which case the Supreme Court of Missouri emphasizes the vital distinction between road districts organized under the Texas law as against the laws of Missouri, a distinction no clearer in legal effect than the distinction stated in our original brief in this case as between the Texas statutes and the Mississippi statutes.

The road district law of Missouri is in many respects similar to that of this state.

[fol. 303] A road district in Missouri is organized by the governing body of the county, called the County Court.

It goes by a different name but its functions are substantially the same as the statutory authority of the Boards of Supervisors under the Constitution and statutes of this State.

With all possible deference, we submit to this Court the advisability of the precedent established by the Supreme Court of Missouri in declaring the clear distinction between its statutes and the Texas statutes condemned in Browning vs. Hooper, supra, a distinction which makes a road district in Missouri, a taxation unit of the State, not a mere local benefit, assessment, or betterment district.

We also submit that the following excerpt from the Court's opinion will be used by appellant in its proposed attack on the road system of Mississippi in the Supreme Court of the United States, as follows, to-wit:

"In other words, *if* Chapter 277 of the Laws of 1920, instead of the scheme therein set out for the organization and establishment of road districts, had conferred on the Board of Supervisors, the legislative authority to organize and establish road districts as just above set out, clearly, under the cases cites, the statute would not have contravened the due process clause of the 14th Amendment." (Italics ours.)

It will certainly be urged by appellant that such language constituted a virtual decision by this tribunal in legal effect that Chapter 277, Laws of 1920, is invalid.

Appellant's implication from such language of the opinion will be that Chapter 277, Laws of 1920, is in contravention of the due process clause of the Fourteenth Amendment, whereas, in fact, the road district system of Mississippi is absolutely distinct and different from the Texas [fol. 304] system of taxation under its statutes, wherefore it must in reason follow that the instant case is controlled by the same principles as in the Nattin case, supra, and by substantially the same principles as are announced in the Thompson case, supra, from Missouri.

We furthermore respectfully call to the Court's attention the fact that the opinion of the Court as now written leaves entirely open the question whether or not Chapter 277, Laws of 1920, violates the due process clause of the Fourteenth Amendment.

As stated elsewhere herein, it is of course true that the final distinction of every Federal question is for the Supreme Court of the United States; but it would certainly be wise and prudent that this Court a Mississippi tribunal,

should so construe the statutes of Mississppi as to reduce the question of due process under the Fourteenth Amendment to the narrowest possible limitations.

Furthermore, and we say it with all deference, the opinion of the Court invites a further attack upon perhaps five hundred road districts in Mississippi, with bond issues in a vast amount, dependent on the validity of our statutes.

Such further attack, which may be anticipated with absolute certainty, will make use of this opinion, with powerful pressure on the fact that the Supreme Court of Mississippi declines to hold its own statute, Chapter 277, Laws of 1920, to be a valid and constitutional statute.

Appellant already attacks in its recent Suggestion of Error the Court's conclusion that even though Chapter 277, Laws of 1920, may be invalid, and even though Chapter 1080, Laws of 1926, may be invalid, nevertheless, the general statute, Chapter 278, Laws of 1926, protects and saves the Oldham Road District.

Its Suggestion of Error lays great emphasis upon the [fol. 305] phraseology of the General Statute, Chapter 278, Laws of 1926, as indicating that the legislature by such statute attempted to validate road districts and their bond issues only in those cases where such districts and such bonds had been "validated or attempted to be validated by any statute enacted during the 1926 session of the legislature."

In other words, appellant now contends today in its Suggestion of error that the legislature has attempted by an omnibus statute to put life and vitality into districts created under a void act, viz., Chapter 277, Laws of 1920, and that they were attempted to be validated by other void acts, such as the special act for the validation of this district, Chapter 1080, Laws of 1926.

Their argument is that Chapter 278, Laws of 1926, cannot give life to a dead district organized under Chapter 277, Laws of 1920.

They are undertaking to bring the instant case within the condemnation of Omnibus Acts as declared in Oregon Short Line Railroad Company vs. Clark County Highway District, et al. 22 (2nd) Fed. 593.

We insist with the most profound respect and deference the inadvisability of leaving open vital principles of statutory law in Mississippi for construction elsewhere.

Under such circumstances, every question that can be raised in the Supreme Court of the United States will be there decided as a matter of first impression, without any assistance or cooperation from this tribunal.

Furthermore, we take the liberty of suggesting that the Supreme Court of the United States is entitled, in right, to all possible help from this tribunal in the construction of Mississippi Statutes.

[fol. 306] The Court's opinion as now written will furthermore be used by appellant in an effort to secure from the Supreme Court of the United States a decision as a matter of first impression on the vital question, whether the special validation acts of 1926 in this State do or do not violate our own constitution.

The opinion expressly states that "the Court is not in agreement as to whether the local and special act violates Section 90 of our Constitution."

A definite adjudication of this issue is peculiarly a matter for decision by this Court, and by this Court alone; but if this Court does not decide that question, then the Supreme Court of the United States is thus authorized and invited to make for the State of Mississippi a decision as a matter of first impression by which five hundred special statutes of our state may be placed in jeopardy.

The Supreme Court of the United States is thereby invited to hold that Chapter 277, Laws of 1920, is of substantially the same legal effect as the Texas statute, and also to hold that the special validation statutes of our State in 1926 are absolutely void, thereby co-operating by inadvertence in the evident purpose of appellant to attack in the Supreme Court of the United States with every possible implication from the opinion of this tribunal, the only issue adjudicated by such opinion, the validity of Chapter 278, Laws of 1926.

These are not hypothetical, conjectural, or imaginary difficulties to which we call the Court's attention.

We believe that a distinct and definite adjudication by this tribunal as to the validity and constitutionality of our own statutes is absolutely vital to the proper presentation

and consideration of the instant case by that tribunal of last resort, which is its destination.

Every concession for the sake of argument in the Court's [fol. 307] opinion and every sinister implication that can by possible ingenuity be drawn therefrom will be used against the Statutes of Mississippi in an effort to invoke adjudication and condemnation thereof as a matter of first impression in the Supreme Court of the United States.

It is our sincere and insistent plea to this tribunal that the laws and statutes of Mississippi shall not be left open for adjudication by the Supreme Court of the United States, but that such adjudication shall be declared by this tribunal.

If such adjudication can be secured from those Justices at present comprising this Division of our Supreme Court, since the recent change in its personnel, that is well and good; but if not, with the most profound respect and deference to the Court, we submit our earnest plea for an adjudication by the Court en banc, with re-argument, if necessary, in order that counsel for appellees may be afforded full opportunity to impress upon the Court if possible the views which we hold with a conviction that may perhaps be dogmatism itself.

We have won this case; and we believe with all sincerity that it involves legal questions absolutely vital to the State of Mississippi and to its road system.

Our position is well supported by counsel for appellant in their recent Suggestion of Error.

It is the argument of such Suggestion of Error that Chapter 278, Laws of 1926, must be unconstitutional and void because it relates and refers to the special statutes of 1926; or in other words, that those special statutes on which the Supreme Court declares its disagreement are unconstitutional and that therefore the general statute must be likewise unconstitutional.

This contention is a sophistry; but what the writer of this suggestion or motion thinks to be a sophistry, or what this tribunal thinks to be a sophistry, may by some possible [fol. 308] peradventure be accepted elsewhere as good logic.

Appellant now insists that if Chapter 1080, Laws of 1926, comes within the inhibition of the Mississippi Constitution,

necessarily Chapter 278 must also come within such inhibition insofar as the Oldham District is concerned; or in other words, that if the special act is void, the general act must also be void, if construed to apply to the Oldham District.

The present road system of Mississippi is controlled today by one statute only, Chapter 225, Laws of 1926.

The second step in the evident railroad purpose in this litigation will be an attack on such statute, Chapter 225, Laws of 1926, on the ground that it is not an independent statutory road system or scheme but that it is based on Section one thereof on "any of the road laws of the State."

This same section of this same statute refers to the intention of the Board of Supervisors, "under the provisions of any general road law of the State."

These references are intended for Chapter 277, Laws of 1920.

If, therefore, the railroads of this State can by any possibly peradventure invalidate through the Courts Chapter 277, Laws of 1920, our present statute, Chapter 225, Laws of 1926, based thereon will be immediately subject to the same identical attack that appellant now directs against Chapter 278, Laws of 1926, in its Suggestion of Error.

In Robertson vs. Le Flore County, supra, Chief Justice Smith declared that Chapter 424, Laws of 1916, did not violate Paragraph L, Section 90 of our State Constitution, for the reason that it does not provide for the "laying out, opening, altering, and working roads and highways."

Such decision and opinion by legal analogy and inference sustains the validity of Chapter 1080, Laws of 1926.

The instant case either falls within or without that de-
[fol. 309] cision.

If within, the Court can well afford to say so.

If without, or if the Court now reaches the conclusion that such original decision is not good law, but should be overruled, we would at least know exactly "where we are at."

The character of appellant's Suggestion of Error in the instant case involved no criticism whatever or complaint of the Court's opinion, but only an attack on its decision.

This means that appellant wants one of two things, viz: either a reversal of this case on its Suggestion of Error or an appeal to the Supreme Court of the United States on this opinion exactly as written, without dotting an "i" or crossing a "t," in which event, the entire road system of Mis-

sissippi under its own statutes will go to the Supreme Court of the United States for decision on first impression in that tribunal, because our own Court on account of disagreement, or for other reasons, does not render a decision as to the validity and constitutionality of our own statutes.

While the Federal Courts have taken the position that an *omnibus* act or general validation statute is insufficient to dispense with the necessity of notice and hearing, they have also uniformly held that where the legislature by special act validates a road district, including the tax levies thereon, then such levy must be considered as a levy made direct by the legislature, wherefore, no notice of hearing to the taxpayers is required under the due process clause of either Federal Constitution or State Constitution.

If, therefore, in view of this difficult and delicate situation, adjudication can be secured for the validity of Chapter 1080, Laws of 1926, that will for all practical purposes settle this case in any and every court.

[fol. 310] Under the sinister implications that will be certainly placed on the present opinion by appellant and its distinguished counsel in the Supreme Court of the United States, we cannot predict what consequences might be possible in this case.

As officers of the Supreme Court of Mississippi, we are doing what we conceive to be our full duty in submitting these respectful and deferential, but positive, observations to the Court.

We are therefore compelled in view of the paramount importance of these questions to urge upon the Supreme Court, at this time such modification and clarification of its former opinion as may be necessary to determine:

First. Whether or not Chapter 277, Laws of 1920, is in conflict with the Fourteenth Amendment to the Constitution of the United States.

Second. Whether or not Chapter 1080, Laws of 1926, is in conflict with Section 90 of the Constitution of Mississippi.

Third. Whether or not as an issue of fact, appellant is subject to an estoppel in equity by virtue of its course of conduct to question or attack the validity of the Oldham Road District and the constitutionality of its bonds.

We will be glad to have this tribunal treat this Suggestion of Error more as a Suggestion or motion for the modification and clarification of the Court's former opinion in accordance with these observations.

We are sure that the Court will understand and appreciate that we are not indulging in captious criticism or technical objections to the character of its opinion; but we are in all sincerity undertaking to emphasize a situation which we believe to be of paramount importance in the instant case and also as a matter of public policy.

Respectfully submitted.

J. A. Cunningham, Benjamin H. Charles, Magruder, Walker & Magruder, Attorneys for Appellees.

[fol. 311] I hereby certify that I have this day mailed a copy of the within and foregoing Suggestion of error to Mr. S. R. Prince, General Solicitor, Southern Railway System, 1300 Pennsylvania Avenue, Washington, D. C. and Mr. John B. Hyde, Special Solicitor, Southern Railway System, 1300 Pennsylvania Avenue, Washington, D. C. and Mr. Ely B. Mitchell, Local Attorney, Corinth, Mississippi, all attorneys for appellant, postage prepaid to their regular post office addresses respectively, as aforesaid.

Witness my signature on this the 18th day of January, A. D. 1929.

W. W. Magruder, Attorney for Appellees.

[File endorsement omitted.]

[fol. 312] In Supreme Court of Mississippi

[Title omitted]

Order Remanding Cause to Division "A"—Feb. 4, 1929

Ordered that this cause be remanded to Division "A" for March 11th, 1929. It is further ordered, adjudged and decreed that the decree entered in this cause on December 22nd, 1928, Minute Book B C page 127 be and the same is hereby set aside and cancelled.

[fol. 313] Order of submission, March 11, 1929, omitted in printing.

[fol. 314] In Supreme Court of Mississippi

No. 27496

Memphis & Charleston Railway Company

vs.

Omer J. Bullen, Sheriff and Tax Collector

Judgment—April 15, 1929

This cause having been submitted on a former day of this term on the record herein from the Chancery Court of Tishomingo County and this court having sufficiently examined and considered the same and being of opinion that there is no error therein doth order, adjudge and decree that the decree of said Chancery Court rendered in this cause on February 11th, 1928, be and the same is hereby affirmed and that the appellee do have and recover of appellant and Ely B. Mitchell and L. B. Mitchell, sureties in the appeal bond, the costs of this cause in this court and in the court below, to be taxed, etc.

[fol. 315] In Supreme Court of Mississippi

En Banc

27496

[Title omitted]

Opinion—Filed April 15, 1929

Anderson, J.:

This cause was submitted to and decided by Division B of the Court. On that hearing the decree of the court below was affirmed. Thereafter a suggestion of error was filed by appellant, followed by an order entered, setting aside the judgment of affirmance, and remanding the cause to the docket for consideration and decision by the Court en banc. The Court en banc, after argument and consideration, adopts the opinion handed down by Division B, and in addition the following opinion.

Ritchie v. Franklin County, 22 Wall. 67, 22 L. Ed. 825, supports the opinion handed down in this case. The Constitution of Missouri prohibited local or special legislation on the subject of the construction and maintenance of public roads and the issuance of bonds therefor. Franklin County in that state issued and sold bonds for the purpose of macadamizing and bridging certain of its roads. The statute under which the bonds were issued and sold required that the expenditure be first approved by the voters. This was not done, and for that reason the Supreme Court of Missouri held the bonds void. Steines v. Franklin County, 48 Mo. 167. The legislature of Missouri thereupon passed a general curative act applying to the whole state by which all road bonds theretofore issued in any county of [fol. 316] the state without authority of law were validated. The Supreme Court of the United States as well as the Supreme Court of Missouri, held the curative act valid. In deciding that question the Supreme Court of the United States used this language:

"There is no provision in the Constitution of Missouri restraining the general assembly from conferring on counties the authority to borrow money to improve their roads without asking the consent of the voters. If so, why cannot the legislature confer on counties the power to borrow money to pay for debts already contracted for this purpose. We agree with the Supreme Court of Missouri that the act in question, being an authority to do a particular thing, may be construed as an original power, but whether it be treated as an original power or as a curative and confirmatory legislation, it is equally valid."

There is some force in the thought that chapter 278 of the Laws of 1926 merely embodied a handful of local laws passed in a single act, but the Missouri statute upheld by the Supreme Court in the above case was exactly that character of statute. The constitutional requirement that a certain character of laws shall be general, and not local, does not prevent a reasonable classification by the legislature. That decision of the Federal Supreme Court is in line with the decisions of this Court. Cox v. Wallace, 100 Miss. 525, 56 So. 461; Toombs v. Sharkey Co., 140 Miss. 676, 106 So. 273; Knox, Atty. Gen. v. Speakes, 144 Miss. 125, 109 So.

129. Cox v. Wallace involved the constitutionality of section 371, Code of 1906. Sections 371 to 391, inclusive, of the Code of 1906, provide for the establishment and maintenance of drainage districts in the state. Section 371 [fol. 317] provides that the act shall not apply "to land overflowed by backwaters of the Mississippi." Considerable territory in the Delta section of the state is subject to overflow by backwaters of the Mississippi River. Paragraph Q of section 90 of the Constitution provides, among other things, that the legislature shall not pass local or special laws relating to water courses. The drainage statute under consideration in that case related to water courses. It was contended that it was a local or special act, because it did not apply to the whole state, and therefore violative of the Constitution. The Court held that the exception in the statute of that territory in the state overflowed by the backwaters of the Mississippi River did not make the act a local or special law. In Knox v. Speakes the Court, in discussing the distinction between local or special laws and general laws, used this language:

"In determining the question whether an act is a general law or a local or special law, the courts will look to the substance and practical operation of the law, rather than to its form and phraseology. The constitutional requirement that certain character of laws shall be general and uniform in their operation does not prevent a reasonable classification by the legislature. A law is general in the sense of such a constitutional provision when it applies to and operates uniformly on all members of any class of persons, *places*, or things requiring legislation peculiar to the particular class dealt with by the law. A law is general and uniform, although it does not operate on every person in the state. It is general and uniform if it operates on every person who is brought within the classification and circumstances provided for by the law. Where a law is [fol. 318] broad enough to reach every portion of the state and to embrace within its provisions every person and thing distinguished by marked characteristics of sufficient importance to make them clearly a class by themselves, it is not a local or special law but a general law, '*even though there be but one member of the class or one place on which it operates*'. (Italics ours.) 25 R. C. L., section 66, p.

815, at page 818. In the case of Tombs v. Sharkey (Miss.) 106 So. 273, at page 275, the language above quoted from 25 R. C. L. section 66, p. 818, is quoted with approval."

The statute here under consideration makes a class of all road districts organized prior to its passage under any of the road laws of the state, and validates such districts and the bonds issued therefor. The statute operates uniformly on all the members of the class, and all the members of the class are marked by like characteristics. The act is general, not special; it covers the whole state, not part of the state, regardless of where the road district is situated.

In view of the large public interests involved in the attack on the constitutionality of chapter 277 of the Laws of 1920 (many millions of dollars of road bonds having been issued under the act, and now outstanding) the Court is asked to pass on that question, as well as the constitutionality of the local act, chapter 1080 of the Laws of 1926, by which the legislature undertook to validate the particular road district here involved, and the bonds issued therefor. We feel constrained for the reasons suggested to do so.

Appellant contends that chapter 277 of the Laws of 1920 is violative of both the Due Process and the Equal Protection clauses of the Fourteenth Amendment to the Federal Constitution. In considering these questions it should [fol. 319] be borne in mind that the road district involved is an ad valorem taxing district, and not a special benefit assessment district. The property of the district, both real and personal, is taxed for state and county purposes in proportion to its assessed value, upon an ad valorem basis, and is likewise taxed under the act for road purposes. The act makes no distinction between real and personal property.

The main case relied upon by appellant to sustain its position that the statute denies to the property owners of the district due process is Browning v. Hooper, 269 U. S. 666, 70 L. ed. 330. In that case it was held that where a local road district was created by petition of a certain per cent of the taxpayers of the territory composing the district, and there was no legislative determination that the property in the district would be benefited by the proposed local improvement, notice to the property owners of the

district, and an opportunity to be heard, was essential to due process. The Texas statute, held to violate due process in that case, did not itself create the district, levy the taxes or fix the amount to be raised for road purposes. There was nothing in the statute to guide or limit the action of the signers of the petition in selecting the property to be assessed and taxed. Subject to a vote of the district, the territory to be taxed was absolutely fixed by the petitioners. The county court had no power to deny the petition. It was bound under the statute to organize into a taxing district, the territory as described in the petition. The Court said, among other things:

"But it is essential to due process of law that such owners be given notice and opportunity to be heard on that question where, as here, the district was not created by the legislature, and there has been no legislative determina-[fol. 320] tion that their property will be benefited by the local improvement. Appellants were denied all opportunity to be heard. No officer or tribunal was empowered by the law of the state to hear them, or to consider and determine whether the road improvements in question would benefit their lands. The act is repugnant to the due process clause of the 14th Amendment."

The Court further stated, however, that where a local improvement territory is selected, and the burden is spread by the legislature, or by some local administrative board to which the state has granted legislative powers on the subject, the property owners have no constitutional right to be heard, and, therefore, there was no denial of due process. St. L. & S. W. Ry. Co. v. Nattin, 277 U. S., 72 L. Ed. 830, involved the constitutionality of a road statute of Louisiana. Under the laws of the state the police juries of the parishes are the governing bodies of the respective parishes. The statute empowered the police juries to create road districts from such portions of their parishes as they might determine, and with the approval of the voters of the district, to issue the bonds of the district, and construct roads from the proceeds thereof. The constitutionality of the statute was challenged upon the ground that it failed to provide the taxpayers of the district with an opportunity to be heard. The Court said that the sufficiently short answer to the contention was that under the repeated de-

cisions of the Supreme Court that was not essential; that the tax sought to be enjoined in that case was a general ad valorem tax, and that its legality did not depend upon the receipt of any special benefit by the taxpayers; that other statutes of the state provided ample opportunities for the [fol. 321] taxpayers to contest the value of their property for the purpose of taxation; that a local legislative body, as was the police jury, when properly authorized, could levy a general ad valorem tax upon all property within its jurisdiction, including common carriers engaged in interstate commerce, without violating the Federal Constitution,—citing Valley Farms Co. v. Westchester, 261 U. S. 155, 67 L. ed. 585; Hancock v. Muskogee, 250 U. S. 454, 63 L. ed. 1081.

Now, applying these decisions of the Supreme Court to the act here involved: If the act confers upon the board of supervisors the legislative discretion of determining whether or not the territory described in the petition shall be organized into a road district, notice and an opportunity to be heard on the part of the taxpayers is not required. Putting it differently,—if, in the organization of a road district under the statute the board of supervisors acts in a legislative capacity, and not in a judicial capacity, and has the legislative discretion to organize, or refuse to organize, the district petitioned for, as they may deem to the best interest of those concerned, then an opportunity to be heard on the part of the taxpayers is not required. Can the act reasonably be so construed?

The provisions of section 2 of the act, which is copied in the opinion handed down in this case, furnish the principal grounds of attack on the constitutionality of the act. Appellant contends that this section of the act made it mandatory on the board of supervisors to organize the road district petitioned for, and that the board had no legislative or other discretion in the matter. We think this question has been, to a large extent, determined against appellant's contention. Chapter 277, Laws of 1920, is amendatory of chapter 176, Laws of 1914; chapter 145, Laws of 1912, and chapter 149, Laws of 1910. So far as [fol. 322] they affect the questions here involved, sections 1, 2 and 3 of the act, sections 8429 to 8431, inclusive, of Hemingway's Code of 1927, have been substantially the same in all four acts. In Robinson v. Itawamba Co., 105

Miss. 90, 62 So. 3, a road district was organized under chapter 149 of the Laws of 1910. The board of supervisors thereafter passed a resolution providing for the issuance and sale of the bonds of the district for the purpose of constructing improved highways. No further steps were taken by the board. On demand of interested parties, the board refused to proceed with the issuance and sale of bonds. Mandamus was sued out to force the board to proceed with the issuance and sale of bonds and construction of the roads. The court held that the board of supervisors could not be forced to issue and sell bonds for two reasons, namely, because the board had the right, under the statute, to exercise its discretion as to whether or not it would do so, and that the law furnished an adequate remedy by appeal to the circuit court from the action of the board in refusing to issue the bonds. The language of section 2 of the statute in reference to the organization of road districts is not any more imperative than the language of section 3 with reference to the duty of the board to issue bonds of the district after the district has been organized. Bryant v. Yalobusha Co. 133 Miss. 714, 98 So. 148, does not hold to the contrary. The road district involved in that case was organized under the statute here under consideration. It was held that if the board of supervisors organized a road district under the act, it had to be the district petitioned for—that the board had no authority under the act to organize either a larger or a smaller district. The question, whether under the act, the board was vested with the discretion whether or not it [fol. 323] would organize any road district whatever, was not involved nor decided in that case. In Prather v. George, 108 Miss. 670, 67 So. 156, chapter 176 of the Laws of 1914, of which the act involved is amendatory, was challenged as unconstitutional on at least two grounds, one of which was that it violated section 170 of the Constitution, in that it encroached on the jurisdiction of the board of supervisors over public highways. It is true, the identical question here involved was not decided in that case, but the Court said, in broad language, that the act did not take away from the board of supervisors its discretionary powers over public roads. Construing the statute in the light of section 170 of the Constitution, vesting in the board of supervisors jurisdiction over roads, bridges and ferries, and the above decisions of our Court, we are of the opinion that the

act vested in the board of supervisors the legislative discretion to organize or refuse to organize, according to their judgment of the best interests of those concerned, the road district petitioned for; that although, under the Yalobusha county case, if a district is organized, it must contain the territory embodied in the petition—no more, no less—still the board is vested with the discretion of deciding whether the benefits to be derived from the proposed district will be justified by the necessary tax burdens. So construing the statute, it comes within the principles laid down by the Supreme Court in the Louisiana case, and falls without the class of statutes held by the Supreme Court as denying due process, in the Texas case.

But if there were any illegality in the organization of the road district and in the issuance of the bonds therefor, such illegality would be cured by the local act, chapter 1080, Laws of 1926, as well as by the general curative act already [fol. 324] discussed. The local act did not violate paragraph L of section 90 of the Constitution, which prohibits local or special legislation on the subject of laying out, opening, altering or working public highways. Robertson v. Leflore Co. 112 Miss. 54, 72 So. 852, is decisive of this question. Chapter 234 of the Laws of 1916 was involved in that case. The act authorized the board of supervisors of Leflore county to issue the bonds of that county to an amount not exceeding $600,000.00 for the purpose of improving the public roads of the county. The bonds were issued under the act, and the validity of the act was challenged, on the ground that it violated paragraph L of section 90 of the Constitution. That was the only question in the case. The Court held the act constitutional, because it did not provide for the laying out, opening, altering or working of public roads; but provided alone for the raising of revenue for that purpose; that the act had nothing to do with the method by which public roads were to be laid out, opened, altered or worked, that being covered by the general laws of the state on the subject. Under the authorities cited in the opinion handed down in this case, the legislature has the power, by a subsequent act, to make valid, proceedings had under a prior void act, provided, under the Constitution, it originally could have authorized the proceedings had. In the light of this principle, the Robertson case means that if LeFlore county had issued

road bonds without any authority of law, the legislature could, by a subsequent local act, applying alone to that county, have validated such bonds. In that case the local act authorized the issuance of the bonds of the county. In the present case, the local act validated the organization of the district, and the bonds issued therefor. We see no difference in principle. The organization of a road district [fol. 325] is a step further removed from the laying out, opening, altering or working of a public road, than the issuance of the bonds of such a district. If the issuance of the bonds could be validated by a local act, the organization of the district could likewise be validated.

Appellant contends that chapter 277 of the Laws of 1920 also violates the equal protection clause of the Fourteenth Amendment, because it is unreasonably discriminatory per se, in that the burden of taxation is not spread over the district in proportion to the benefits, but only in proportion to the accidental facts, including the general wealth of the individuals and corporations chancing to have taxable property in the district; and for the further reason—the act authorizes the taxation of real and personal property, based on its general assessed valuation, to pay the cost of local improvements to real property. To sustain that position appellant relies on Road Improvement District No. 1 vs. Missouri Pacific R. R. Co., 274 U. S. 188, 71 L. Ed. 992, and other decisions of the Supreme Court along the lines of that case. The taxing district involved in that case was not an ad valorem district, but a special benefit assessment road district. The assessment against the railroad company for road improvements was based upon personal property, as well as real property, while all other assessments in the district were confined to real property alone. The assessment against the railroad was 13.2% of the costs of a hard surface road paralleling the railroad. The area of the railroad in the road district was eight-tenths of 1% of the entire area of the district. The court held that the assessment was plainly arbitrary and discriminatory, and violative of both the Due Process and the Equal Protection clauses of the Fourteenth Amendment.

[fol. 326] We have no such case here. All property in the district involved in this case, both real and personal, on which an ad valorem tax is levied for general state and county purposes is likewise levied for road purposes of

the district. Appellant lays stress on the following facts: The area of the district is 2,950 acres, of which appellant owns only 57.79 acres, which is 1.9 of the whole acreage; the assessed valuation of appellant's property in the district is 62.39% of the entire assessed valuation of the district. The evidence showed, however, that the proceeds of the bonds issued for the district had been expended on public roads, and none of the roads constructed ran parallel with the appellant's line of railroad, but nearer at right angles with it; that the road district was composed of a little less than five sections, but that the sections were not strung along, one after the other, so as to take in as much of appellant's line of railroad as could be done; and, furthermore, the evidence tended to show, and the chancellor found as facts, that the improved roads in the district would benefit appellant's business as a common carrier, both directly and indirectly,—that the direct benefit would be derived from an increased tonnage for appellant from the gravel mines in the district, which gravel mines were made more accessible to miners by virtue of the improved roads. In other words, that the improved roads increased the labor facilities in the gravel mines to such an extent that the output of the mines would be materially *be* increased, the output of the mines being transported alone over appellant's lines of railroad. We are unable to see that the operation of the statute has worked any arbitrary and unreasonable discrimination against appellant. We do not think the cases relied on by appellant at all decisive in [fol. 327] favor of appellant's contention.

The only other question which we think calls for discussion by the Court is appellant's contention that proof of publication of the notice of the bond election was not on file with the board of supervisors when the board declared the result of the election, and provided by resolution for the issuance of the bonds. Appellant contends that proof of publication of the notice was jurisdictional—that it had to appear on the minutes of the board before provision was made for the issuance of the bonds. If appellant's position in that respect be sound, it appears that a complete and short answer to the contention is that the failure of the board to have proof of publication of notice on file and spread on its minutes, was cured by both the

general and local validating acts already discussed in this opinion.

Affirmed.

[File endorsement omitted.]

[fol. 328] IN SUPREME COURT OF MISSISSIPPI, EN BANC

[Title omitted]

CONCURRING OPINION—Filed April 15, 1929

ETHRIDGE, J., specially concurring:

I concur in the conclusion reached in the opinion written by Judge Anderson in this case, and in most of the reasoning therein, but I do not believe that Chapter 1080, Laws 1926, is valid, or has any curative effect whatever; nor do I believe that the case of Robertson v. Le Flore County, 112 Miss. 54, 72 So. 852, affects the decision of the question here. That case had nothing to do with the construction and laying out of roads, while Chapter 277, Laws 1920, expressly provides for the construction and maintenance of highways for the convenience of the traveling public.

The dominant purpose of Chapter 277, Laws 1920, is the construction and maintenance of public roads. Clause (1) of Section 90 of the State Constitution prohibits special laws for laying out, opening, altering, and working roads and highways. If Chapter 277 was unconstitutional (which I do not believe), it would not be cured by a special, local curative act. While this clause is express in its terms and clearly prohibits any special road law, under any guise or form whatever, regarding the subjects therein named, it is not the only provision of the Constitution upon the subject. [fol. 329] By Section 85 of the Constitution, it is provided:

"The legislature shall provide by general law for the working of public roads by contract or by county prisoners, or both. Such law may be put in operation only by a vote of the board of supervisors in those counties where it may be desirable."

It will be noted that the requirement here is by general law, and, by implication, prohibits special laws; and Chapter 277 is one of the laws enacted by the legislature to carry out the provision of this section. Again, Section 88 of the Constitution provides for general laws for the protection of local and private interests, wherever they can be enacted, and reads,—"The legislature shall pass general laws, under which local and private interests shall be provided for and protected," etc. These sections clearly indicate that the policy of the State is to have general laws enacted to cover a particular case wherever they can be enacted, while Clause (1) of Section 90, as above stated, prohibits absolutely the enactment of local or special laws upon the subjects therein named; and it is clearly beyond the power of the legislature to enact a local or special law, as it undertook to do, in Chapter 1080, Laws 1926, upon this subject.

One of the purposes to be conserved by the Constitution is to have wise, considered, legislation wherever that can be had. It is well known that the legislature is much more careful in the enactment of general laws than it is of local or special laws. General laws are enacted for the whole state, and for the people within the state who fall within the subject-matter of the legislation. When laws are being passed, the enactment of which affects the interest of the [fol. 330] whole people or the state, their effect will be much more carefully studied and considered than will be the case where they affect a portion of a territory, or only a portion of the people of the state. Men will be more careful of their votes if the effect of the law is general. Special laws wither confer special privileges or advantages or else impose special burdens. Local laws, however, affect only a particular portion of the state and a certain class of people, or particular individuals, and for this reason the Constitutional Convention clearly indicated a definite purpose to have only general laws where such could be applied. These constitutional provisions should be given a fair construction by the court in order that they may serve the purpose for which they were enacted.

Since the original opinion was rendered this case (which was withdrawn after suggestion of error was filed), I have come to doubt the constitutionality of the general act referred to in Judge Anderson's opinion, Chapter 278, Laws

1926, but my doubts, however, are not strong enough, with the construction put upon it by the court and the authorities cited from the United States Supreme Court, to warrant my dissenting. I think, however that Chapter 277, Laws 1920, is constitutional and needs no curative act. By Section 1 of that Act, it is provided that:

"The board of supervisors of any county in this state are hereby authorized and empowered to construct; or construct and maintain, or maintain, one or more highways for the convenience of the traveling public, by contracts in one or more supervisor's districts of said county, or part of one supervisors' district, or two or more or parts of two or more supervisor's districts in such county, and for that purpose are authorized to issue and sell bonds and to [fol. 331] levy and to collect taxes to pay such bonds and to maintain such roads so constructed in the manner herein provided."

In my opinion, the board of supervisors, by this section, have full power to create the road district, and are not limited in that power to a petition, or other action, by the people. Sections 2, 3 and 4 of the act provide for the issuance of bonds, and while the language of Section 2 thereof is not clear, reading, "That on presentation to the board of supervisors of any county of a petition containing the names of 20 per cent of the qualified electors of any one or more supervisors districts of any territory proposed to be created and organized into a road district of such county asking that such district or districts or territory be permitted to come under the provisions of this act it shall be the duty of such board of supervisors to order an election" etc., its language does not restrict the boards' right to create road districts but is applicable to the bond issue. By reference to Section 85 of the Constitution, above quoted, it will be seen that a law of the character of Chapter 277 can only be put in force by the board of supervisors; and the purpose of the petition is to have the board adopt the law, if it will, and make effective the purpose of the statute. The sections of the act do not specifically provide that it shall be the duty of the board to grant the petition regardless of its desire and judgment in the matter—in other words, the duty is not imposed upon the board to create a district,

but is imposed merely for the purpose of securing a bond issue to provide money to make the scheme effective. The board may, independent of the people, create a road district under Section 1 of the act; it may refuse to do so if it thinks proper. If it does refuse, no proceeding can be had under the law. I think it plain that in construing Sections 170 [fol. 332] and 85 of the Constitution together with Section 1 of Chapter 277, the board's jurisdiction and power is plenary and in creating a road district. I think, therefore, Bryant v. Yalobusha County, 135 Miss. 714, 98 So. 148, should be modified or overruled. When that case was decided, the constitutional questions involved here were not presented and argued in that case. But I agree with Judge Anderson's opinion, that the board of supervisors, in that case, are not required to create a district, and that they may refuse to do so. This being true, the board has legislative discretion to create a road district, and such discretion, conferred by Section 170 of the Constitution, does not require notice and hearing on the part of the people or taxpayers.

[File endorsement omitted.]

[fol. 333] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

DISSENTING OPINION—Filed April 15, 1929

SMITH, C. J., dissenting:

The road district here in question is composed of 2950 acres of land through which the appellant's railroad runs; it owning 57.79 acres of the land composing the district. There were eighteen qualified electors residing in the district, twenty percent of whom filed a petition with the board of supervisors under section 2, Chapter 277, Laws of 1920, praying that the territory therein described be permitted to come under the provisions of Chapter 277 Laws of 1920, and that the board submit to the electors of the proposed district the question of the issuance of bonds of the district

for the purpose of obtaining money thereon for the maintenance of public roads therein. This election resulted in favor of the issuance of the bonds, and the board of supervisors thereafter proceeded in accordance with the provisions of the statute.

The injunction here sued out by the appellant is to restrain the sheriff from collecting taxes on the appellant's property levied by the board of supervisors on the property in the district as described in the petition praying for the creation thereof, and among the questions here presented [fol. 334] are: Was the district as originally created valid, and if that question should be answered in the negative, then was the creation of the district validated by the two statutes thereafter passed by the Legislature for that purpose.

Section 2, Chapter 277, Laws of 1920, makes it mandatory on boards of supervisors to create a road district in accordance with the prayer of a petition therefor, and to issue the bonds of the district for the purpose of maintaining roads therein, provided, a majority of the qualified electors therein shall assent thereto in an election held for that purpose. The board of supervisors is without power to decline to act on the petition when signed by twenty per-cent of the qualified electors of the territory of the proposed district, and in Bryant v. Yalobusha County, 133 Miss. 714, 98 So. 148, it was held that the board is without power to create a district with territory different from that described in the petition. The statute is plain and unambiguous and I am at a loss to see how it can be otherwise construed. At all events no discretion in creating this district was exercised by the board of supervisors. It acted purely in a ministerial capacity and confined itself "solely to carrying out the will of the petitioners".

A local improvement district, as the one here in question, may be created by a legislative body having full power over the subject without an opportunity being given to the owners of land therein to protest against the creation of the district. Under section 170 of the State Constitution the Legislature may authorize boards of supervisors to create a road district without giving the land owners therein an opportunity to be heard in opposition thereto, provided, such boards are

permitted to exercise full legislative discretion in creating the districts. But where an improvement district is created [fol. 335] by an administrative board to which the power so to do has been legally delegated, which has not the right to exercise its own discretion in creating the district, but must create the district, if at all, in accordance with a prayer of a petition therefor, all land owners in the district have the right to be heard in opposition thereto, and to deprive them of that right would be to take their property without due process of law. Browning v. Hooper, 269 U. S. 396. Such was the case here, and consequently the original creation of the district was a nullity.

The validating statutes can breathe no life into the district. Such statutes may cure a defectively created improvement district, provided the district was created in a manner which the Legislature in the first instance could have authorized. Such is not the case here, for the Legislature was without power to have created this road district in the manner that it was created. No legislative body exercising full discretion in the matter has here acted, but the district was arbitrarily created in accordance with the wishes of a portion only of the land owners of the district.

There is another reason why Chapter 1080 of the Laws of 1926 should not be upheld as a validating statute. It is beyond question a local and special statute relating to the "laying out, opening, altering, and working roads and highways," and therefore violates paragraph L, section 90 of the State Constitution, but as to that I am not clear and will express no opinion thereon.

Neither of these statutes can be upheld on the theory that by them the Legislature itself created this road district, for to so hold would bring Chapter 1080, Laws of [fol. 336] 1926, within the prohibition of Section 90 of the State Constitution, and both of them within the prohibition of Section 170 of the State Constitution, under which the Legislature is without power to create a special road district of the character of the one here in question, but can only regulate the manner in which such districts may be created by boards of supervisors. Moreover, to apply these statutes here as a legislative creation of the district would give them a retroactive effect and I doubt the Legislature's power to give them such an effect.

I think the case is controlled by Browning v. Hooper, supra, and that the judgment of the court below should be reversed.

[File endorsement omitted.]

[fol. 336½] In Supreme Court of Mississippi

[Title omitted]

Order Withholding Mandate—May 7, 1929

This cause coming on to be heard by consent of counsel and it appearing to the court that appellant, Memphis & Charleston Railway Co. intends to appeal from the decision rendered herein by the court on April 15, 1929 to the Supreme Court of the United States under 28 U. S. Code, 344a as amended by The Act of Congress of January 31, 1928, 45 Stat. 54, and the Act of Congress of April 26, 1928, 45 Stat. 466 within three months after the entry of the judgment or decree in this court:

Now, therefore, counsel consenting, it is ordered that further proceedings herein be and they are hereby stayed and that the sending down of the mandate of this court be and the same is hereby withheld for three months from April 15, 1929, or until appellant shall have filed and had acted upon its petition for an appeal to the Supreme Court of the United States.

This the 27th day of April, 1929.

George H. Ethridge, Judge of the Supreme Court of Miss.

We consent: S. R. Prince, John B. Hyde, Attorneys for Appellant. Magruder, Walker & Magruder, J. A. Cunningham, Benj. H. Charles, Attorneys for appellees.

[fol. 337] In Supreme Court of Mississippi

[Title omitted]

Petition for Appeal, Assignments of Error and Prayer for Reversal, and Supersedeas—Filed July 8, 1929

Petition for Appeal

The Memphis & Charleston Railway Company, the appellant herein, considering itself aggrieved by the final

judgment of the Supreme Court of the State of Mississippi rendered on April 15, 1929, in the above-entitled cause, reported in 121 Sou. 826, presents this petition within three months thereafter, and respectfully shows that:

I

Said final judgment was in a suit in the highest court of said State in which a decision could be had, in which suit there was drawn in question the validity of the following statutes of the State of Mississippi: to wit, Chapter 277, Laws of Mississippi of 1920; Chapter 1080, Laws of Mississippi of 1926; and Chapter 278, Laws of Mississippi of 1926, being Section 8547 of Hemingway's 1927 Code of Mississippi, on the ground of said statutes, and each of them, and the assessment made against appellant pursuant to their provisions, being repugnant to the Constitution of the United States; to wit, being violative of the Fourteenth Amendment to said Constitution, the said decision of said Court being in favor of the validity of said statutes and said assessment based thereon.

[fol. 338] Jurisdiction of the Supreme Court of the United States on appeal is, therefore, invoked by said appellant under Section 237 of the Judicial Code of the United States, as amended by the Act of February 13, 1925 (43 Stat. 936), 28 U. S. C. 344a (as in effect prior to the Act of January 31, 1928, 28 U. S. C. 861a, 861b, Chapter 14, 45 Stat. 54, or the amendatory Act of April 26, 1928, 28 U. S. C. 861b, Chapter 440, 45 Stat. 466), and pursuant to the said provisions of the said last two mentioned acts of the year 1928.

II

The appellant hereby prays for an appeal to the Supreme Court of the United States, for the requisite citation upon the appellees, for an order fixing the amount of the bond on said appeal, and for a supersedeas and stay of execution or of other proceedings under said final judgment pending this appeal.

III

The transcript of the record herein, on page 3, shows that, by agreement, appellee C. L. Pace has been substi-

tuted for appellee Omer J. Bullen; appellee G. C. Stephens, for appellee J. M. Page; and appellee A. B. Long, for appellee J. F. Oaks; and in this connection, appellant prays that the proceedings herein on appeal and the record be amended, styled, and designated in accordance with said agreed substitution.

Assignments of Error

And the said Memphis & Charleston Railway Company, appellant herein, assigns the following errors in the record and proceedings in said case:

First

The Supreme Court of the State of Mississippi erred in holding that Chapter 277, Laws of Mississippi of 1920, and the acts purporting to validate the proceedings thereunder; [fol. 339] to wit, Chapters 278 and 1080, Laws of Mississippi of 1926, and the proceedings pursuant thereto, whereunder the Oldham Road District was organized and purported to be validated, resulting in the assessment against appellant attacked herein, are, as applied to appellant, valid; the error being that said laws are, and each of them is, and all of said proceedings are, unconstitutional and void, taking appellant's property without due process of law and denying to appellant the equal protection of the law, in violation of appellant's rights under the Fourteenth Amendment to the Constitution of the United States, in that under the terms of said statutes there is imposed special taxation upon all the property, personal as well as real, within the boundaries of the special road district organized thereunder, not in proportion to the specific benefits to such property, but on the basis of the valuation thereof for general purposes of taxation, such basis being palpably arbitrary and discriminatory; and in any event the inclusion of personal property in said assessment is capricious, arbitrary, and discriminatory; the said personal property in said district not being benefited at all by the local improvement for which the tax is assessed.

Second

The Supreme Court of the State of Mississippi erred in holding that Chapter 277, Laws of Mississippi of 1920, and

the acts purporting to validate the proceedings thereunder; to wit, Chapters 278 and 1080, Laws of Mississippi of 1926, and the proceedings pursuant thereto, whereunder the Oldham Road District was organized and purported to be validated, resulting in the assessment against the appellant attacked herein, are, as applied to appellant, valid; the error being that said laws and proceedings are unconstitutional and void, taking appellant's property without due process of law and denying to appellant the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, in that said assessment, made pursuant to the provisions of said laws, is so plainly and palpably arbitrary, is so grossly excessive in amount, [fol. 340] is so unreasonably discriminatory, and is such a plain abuse as that it violates appellant's constitutional rights aforesaid.

PRAYER FOR REVERSAL AND SUPERSEDEAS

For which errors above set out, the appellant, the Memphis & Charleston Railway Company, prays that the said judgment of the Supreme Court of the State of Mississippi dated April 15, 1929, in the above-entitled cause be reversed and a judgment rendered in favor of appellant, and for costs.

And appellant further prays that it may have a supersedeas to the said final judgment of the Supreme Court of Mississippi and that execution thereof and other proceedings under said judgment be stayed pending the appeal.

And appellant further prays that the Clerk of the Supreme Court of the State of Mississippi be directed to style the record and proceedings on appeal in accordance with the substitution of the parties hereinbefore set out.

Appellant herewith tenders bond in such sum as the Court may require.

This 8th day of July, 1929.

Memphis & Charleston Railway Company, Appellant, by S. R. Prince, John B. Hyde, Counsel. Ely B. Mitchell, L. E. Jeffries, of Counsel.

[fol. 340½] [File endorsement omitted.]

[fol. 341] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 8, 1929

On reading and considering the foregoing petition for appeal, assignments of error, and prayer for reversal and supersedeas, and it appearing that said appeal should be allowed;

It is ordered that an appeal of the above case is hereby allowed to the Supreme Court of the United States.

And the Clerk of this Court is directed to style the record and proceedings on appeal in accordance with the substitution of the parties shown in the record.

And it is further ordered that, bond having been given, as hereinafter stated, supersedeas be, and the same hereby is, granted to the judgment of the Supreme Court of the State of Mississippi dated April 15, 1929; that the appellees, their agents and their attorneys be, and they hereby are, restrained from enforcing the assessment involved in this case; and that execution and other proceedings under said judgment be, and the same hereby are, stayed, pending the said appeal.

[fol. 342] Appellant having tendered and filed a supersedeas and cost bond with good and sufficient security, conditioned as required by law in such cases made and provided, said bond is accordingly approved.

Witness the Honorable Sydney Smith, Chief Justice of the Supreme Court of the State of Mississippi, this 8th day of July, in the year of our Lord One Thousand, Nine Hundred and Twenty-nine.

Sydney Smith, Chief Justice Supreme Court of Mississippi.

[fol. 342½] [File endorsement omitted.]

[fols. 343 & 344] Bond on appeal for $5,000, approved and filed July 8, 1929, omitted in printing.

[fol. 345] Citation, in usual form, showing service on J. A. Cunningham et al., filed July 11, 1929, omitted in printing.

[fol. 346] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

PRÆCIPE FOR TRANSCRIPT—June 20, 1929

Mr. W. W. Magruder, % Magruder, Walker & Magruder, Attorneys at Law, Starkville, Miss.

DEAR MR. MAGRUDER: As Mr. Prince has heretofore advised you, and pursuant to the previous correspondence, it is our purpose to appeal this case to the Supreme Court of the United States. I have been waiting to write you until I should have been able to reproduce the two maps in the record in such shape that they could be included in the printed records on appeal. The original maps have today been returned from the lithographier, although the reproductions are not quite ready yet.

I am sending to you, however, under separate cover, the entire original record in the case. It is our plan to file the appeal papers in the Supreme Court of Mississippi as soon as you and ourselves can agree upon the record, as I think in this case there will certainly be no need to file a formal præcipe designating the parts of the record to go up.

In connection with the record, I have the following suggestions:

1. Omit pages 38-49, inclusive, (being the original answer which has been superseded by the amended answer, which appears on pages 22-37½ inclusive).

2. Omit pages 57-58 (with the exception of a paragraph on page 58, which contains the ruling of the court which [fol. 347] you will find indicated as not crossed out in pencil), and continuing, omit page 59 and the portion of page 60 crossed out in pencil.

3. On the top of page 157 you will find a correction in pencil, substituting "Memphis & Charleston" for "Frisco."

4. On page 83 you will note a correction of "$35,000" for "$3,500."

5. Omit the bottom half of page 203, and all of page 204, and the bottom part of page 206.

6. Omit the language crossed out on page 215, all of page 216, and the first three lines of page 217.

7. Omit the language crossed out commencing on the bottom of page 238, and thence through page 242, inclusive,

leaving in a short block of testimony on page 243, then omitting the rest of page 243 through 249, inclusive.

8. Omit the language commencing one-third down page 254, all of 255, and the first five lines of 256.

9. Commencing about one-third down page 261, omit that language and omit all of the following pages to and including page 285.

10. Commencing with the bottom part of page 286, omit that portion crossed out thereon and all of the following pages to and including page 295.

11. Omit the portion crossed out on page 301.

12. Omit all of pages 304, to 308½ inclusive, down to the words, "defendants announced they would rest."

As to the exhibits, I think the following may be omitted:

1. Exhibits 1 to 43, Bullen's testimony (being cancelled vouchers).

2. Exhibits AA, BB, and CC to Bullen's testimony (being the copies of "The Vidette").

I would like to have copied in the record the following [fol. 348] exhibits:

1. Exhibit "D" to Bullen's testimony, being map of county with superimposed boundaries of taxing districts (I have reproduced this map and will file sufficient copies thereof with the Clerk).

2. Exhibit "A" to Davis' testimony, being the blue print of the Oldham Road District (I have also reproduced this blue print and will file sufficient copies with the Clerk).

3. Exhibit FF to Bullen's testimony, being the receipt of the county for the proceeds of the bonds.

4. Exhibit E, Bullen's testimony, being the tax assessment list for 1926.

5. Exhibit A to Joe White's testimony.

6. Exhibit C to Freeman's testimony.

7. Exhibit E to Freeman's testimony.

8. Exhibit F to Bullen's testimony.

The record as made up by the court, of course, will contain all the technical matters of record, such as the opinions of the Supreme Court, the assignments of error, the suggestions of error, etc., etc.

As soon as possible I would like to be advised whether or not these suggestions meet with your approval. If they do so, will you please advise me, and will you kindly send the

record to Mr. Buck, Clerk of the Supreme Court of Mississippi?

Since dictating the above I have been handed the reproductions of the two maps, being Exhibit D to Bullen's testimony, and Exhibit A to Davis' testimony, and I enclose herein a copy of each so that you may see them.

Yours very truly, John B. Hyde, Solicitor.

Copy to Honorable W. J. Buck, Clerk of the Supreme Court of Mississippi, Jackson, Mississippi.

[fol. 348½] In Supreme Court of Mississippi

[Title omitted]

Stipulation re Transcript of Record

It is hereby stipulated between counsel for appellant and appellees that the Clerk of the Supreme Court of Mississippi shall include in the transcript of the record to be filed in the Supreme Court of the United States the entire record of the case in the Supreme Court of Mississippi, including the assignment of errors and all opinions of the court delivered in the case, with the exception that he shall omit those portions of the record described as to be omitted in the letter from John B. Hyde to W. W. Magruder, dated June 20, 1929.

The said Clerk will copy in the transcript of the record the exhibits listed in said letter to be copied, with the exception of Exhibit "D" to Bullen's testimony, and Exhibit "A" to Davis' testimony, the originals of these exhibits to be certified to the Supreme Court of the United States.

This 15th day of July, 1929.

S. R. Prince, John B. Hyde, Counsel for Appellant.
W. W. Magruder, Counsel for Appellees.

[fol. 349] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 350] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed July 31, 1929

Now comes the appellant and adopts its two Assignments of Error as its statement of the points to be relied upon, and it respectfully represents that the whole of the record, as filed, is necessary for the consideration of the case.

S. R. Prince, John B. Hyde, Counsel for Appellant.
L. E. Jeffries, Ely B. Mitchell, of Counsel.

DISTRICT OF COLUMBIA,
City of Washington:

John B. Hyde, having been duly sworn, makes oath and says that he mailed, by registered United States mail, copies of the foregoing Statement of the Points to be Relied Upon and Designation of the Parts of the Record to be Printed, to counsel of record for the appellees on the 31st day of July, 1929.

John B. Hyde.

Sworn to and subscribed before me this the 31st day of July, 1929. P. K. Howard, Notary Public. My commission expires May 29, 1930. (Seal Paul K. Howard, Notary Public, District of Columbia.)

[fol. 351] [File endorsement omitted.]

Endorsed on cover: File No. 34,407. Mississippi Supreme Court. Term No. 276. Memphis & Charleston Railway Company, appellant, vs. C. L. Pace, G. C. Stephens, R. C. Grisham, et al. Filed July 31, 1929. File No. 34,407.

FILE COPY

Office Supreme Court
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CHARLES ELMORE

No. 8

IN THE

Supreme Court of the United States

OCTOBER TERM 1929.

MEMPHIS & CHARLESTON RAILWAY COMPANY, *Appellant*,
v.
C. L. PACE, *et al.*, *Appellees*.

STATEMENT AS TO JURISDICTION ON APPEAL.

S. R. PRINCE,
JOHN B. HYDE,
Counsel for Appellant.

L. E. JEFFRIES,
ELY B. MITCHELL,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM 1929.

MEMPHIS & CHARLESTON RAILWAY COMPANY, *Appellant*,

v.

C. L. PACE, *et al.*, *Appellees*.

STATEMENT AS TO JURISDICTION ON APPEAL.

May It Please the Court:

The appellant, in support of the jurisdiction of this Court to review the above entitled case on appeal, respectfully represents:

I.

STATUTORY PROVISION SUSTAINING JURISDICTION.

Jurisdiction of the Supreme Court of the United States on appeal is invoked by appellant under Section 237a of the Judicial Code of the United States, as amended by the Act of February 13, 1925 (43 Stat. 937), 28 U. S. C. 344a (as in effect prior to the Act of January 31, 1928, 28 U. S. C. 861a, 861b, Chapter 14,

45 Stat. 54, or the amendatory Act of April 26, 1928, 28 U. S. C. 861b, Chapter 440, 45 Stat. 466), and pursuant to the provisions of the said last two mentioned acts of the year 1928, said Section 237a of the Judicial Code as amended by the said Act of February 13, 1925, 28 U. S. C. 344a, as pertinent to this case, providing as follows:

> "* * * A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * *"

For the "writ of error" specified in Section 344a above, an "appeal" has been substituted by said Acts of the year 1928, specified above.

II.

DATE OF JUDGMENT AND DATE OF APPLICATION FOR APPEAL.

The judgment of the Supreme Court of Mississippi sought to be reviewed was rendered on April 15, 1929 (R. 314).

The application for appeal was presented on July 8, 1929 (R. 340)..

III.

NATURE OF CASE AND RULINGS BELOW.

This is a suit filed to enjoin the collection of an assessment for special road district taxes imposed on

appellant by a special road district in the State of Mississippi, created under and pursuant to the provisions of Chapter 277, Laws of Mississippi of 1920, the creation of said district having been legislatively validated by Chapter 1080, Private and Local Laws of Mississippi of 1926, and Chapter 278, Laws of Mississippi of 1926, being Section 8547 of Hemingway's 1927 Code of Mississippi. The suit was commenced in the chancery court of Tishomingo County, Mississippi, by original bill filed on May 13, 1927 (R. 6-25), in which bill the validity of said assessment against appellant was attacked on the grounds, among others, that said statutes as applied to appellant were repugnant to the Constitution of the United States, being violative in particular of the Fourteenth Amendment to said Constitution.

Chapter 277, Laws of Mississippi of 1920, was alleged in the bill to be repugnant to the due process clause of said Amendment in that no notice or right to hearing was afforded in the creation of said special district, and that in any event the said assessment was plainly arbitrary, unreasonable and discriminatory and was thus violative of the due process and equal protection clauses of said Amendment; and that the validating acts of 1926 were likewise void (Bill, R. 6-25).

From an adverse decision in the said chancery court (opinion of lower court, R. 260-263) and a judgment dismissing the cause (R. 269), the appellant appealed to the Supreme Court of Mississippi, the highest court in the State in which a decision could be had, assigning errors, which raised all of the above constitutional questions, among others (Assignments of Error in the Supreme Court of Mississippi, R. 278-282).

The said Supreme Court of Mississippi on the ap-

peal held (a) that Chapter 277, Laws of Mississippi of 1920, was not violative of the due process clause because special road districts organized thereunder were the equivalent of legislatively created districts, (b) that Chapter 1080, Private and Local Laws of Mississippi of 1926, and Chapter 278, Laws of Mississippi of 1926, were valid under the Mississippi constitution and served to validate the organization of the district, even if invalid theretofore, and (c) that the assessment imposed on appellant by the said statutes and the proceedings in conformity thereto was not wanting in due process of law, nor so discriminatory as to deny the equal protection of the laws, the court saying, in the final opinion rendered on April 15, 1929 (R. 315-327):

> "(5) Appellant contends that chapter 277 of the Laws of 1920 also violates the equal protection clause of the Fourteenth Amendment, because it is unreasonably discriminatory *per se,* in that the burden of taxation is not spread over the district in proportion to the benefits, but only in proportion to the accidental facts, including the general wealth of the individuals and corporations chancing to have taxable property in the district; and for the further reason the act authorizes the taxation of real and personal property, based on its general assessed valuation, to pay the cost of local improvements to real property. To sustain that position, appellant relies on Road Improvement Dist. No. 1 v. Missouri Pacific R. R. Co., 274 U. S. 188, 47 S. Ct. 563, 71 L. Ed. 992, and other decisions of the Supreme Court along the lines of that case. The taxing district involved in that case was not an ad valorem district, but a special benefit assessment road district. The assessment against the railroad company for road improvements was based upon per-

sonal property, as well as real property, while all other assessments in the district were confined to real property alone. The assessment against the railroad was 13.2 per cent. of the costs of a hard-surface road paralleling the railroad. The area of the railroad in the road district was eight-tenths of 1 per cent. of the entire area of the district. The court held that the assessment was plainly arbitrary and discriminatory, and violative of both the due process and the equal protection clauses of the Fourteenth Amendment.

"We have no such case here. All property in the district involved in this case, both real and personal, on which an ad valorem tax is levied for general state and county purposes is likewise levied for road purposes of the district. Appellant lays stress on the following facts: The area of the district is 2,950 acres, of which appellant owns only 57.79 acres, which is 1.9 per cent. of the whole acreage; the assessed valuation of appellant's property in the district is 62.39 per cent. of the entire assessed valuation of the district. The evidence showed, however, that the proceeds of the bonds issued for the district had been expended on public roads, and none of the roads constructed ran parallel with the appellant's line of railroad, but nearer at right angles with it; that the road district was composed of a little less than five sections, but that the sections were not strung along, one after the other, so as to take in as much of appellant's line of railroad as could be done; and, furthermore, the evidence tended to show, and the chancellor found as facts, that the improved roads in the district would benefit appellant's business as a common carrier, both directly and indirectly—that the direct benefit would be derived from an increased tonnage for appellant from the gravel mines in the district, which gravel mines were made more accessible to miners by virtue of the improved roads. In other words, that the im-

proved roads increased the labor facilities in the gravel mines to such an extent that the output of the mines would be materially increased, the output of the mines being transported alone over appellant's lines of railroad. *We are unable to see that the operation of the statute has worked any arbitrary and unreasonable discrimination against appellant.* We do not think the cases relied on by appellant at all decisive in favor of appellant's contention." (Italics added.)

Memphis & Charleston Railway Co. v. Bullen, —— Miss. ——, 121 Southern 826 (loc. cit. 832).

The judgment of the lower court, dismissing the cause, was accordingly affirmed (R. 314).

This judgment of the State's highest court foreclosed a review in this Court of all technical questions considered below having to do with the original creation of the special district and there is here sought but to review the two questions stated in the Assignments of Error in this Court, incorporated in the Petition for Appeal (R. 337-340), namely:

(1) Whether or not the imposition of special road taxes, by the express force of said statutes themselves, upon all property, personal as well as real, within the special district, not in proportion to the specific benefits to such property, but in proportion to its general taxation value, is palpably arbitrary and discriminatory; in any event the inclusion of appellant's personal property in the basis for taxation being capricious, arbitrary and discriminatory; thus being violative of the Fourteenth Amendment.

(2) Whether or not the assessment against appellant, imposed by force of such statutes, is so plainly and palpably arbitrary, is so grossly excessive in

amount, is so unreasonably discriminatory, and is such a plain abuse as to take appellant's property without due process of law and to deny to appellant the equal protection of the laws, thus being violative of the said Fourteenth Amendment.

IV.

CASES BELIEVED TO SUSTAIN JURISDICTION

The following decisions of this Court are believed to sustain jurisdiction of this appeal.

A.

As to Right of Appeal (as substituted for Writ of Error):

Miller v. Schoene, 276 U. S. 272.
King v. City Council of Augusta, 277 U. S. 100.
Sultan Ry. & Timber Co. v. Department of Labor and Industries of the State of Washington, 277 U. S. 135.
Sprout v. City of South Bend, Ind., 277 U. S. 163.
Larson v. State of South Dakota, 278 U. S. 429.
Salomon v. State Tax Commission of New York, 278 U. S. 484.

B.

As to the assessment being violative of the Fourteenth Amendment:

Gast Realty & Inv. Co. v. Schneider Granite Co., 240 U. S. 55.
Thomas v. Kansas City Southern R. Co., 261 U. S. 481.
Kansas City Southern R. Co. v. Road Improvement Dist. No. 3, 266 U. S. 379.

Road Improvement District No. 1 v. Missouri Pacific R. Co., 274 U. S. 188.
Standard Pipe Line Co. v. Miller County Highway, etc. District, 277 U. S. 160.

It is therefore respectfully submitted that this Court has jurisdiction of this appeal by virtue of Section 237a of the Judicial Code, 28 U. S. C. 344a.

Respectfully submitted,

S. R. PRINCE,

JOHN B. HYDE,

Counsel for Appellant.

L. E. JEFFRIES,
ELY B. MITCHELL,
Of Counsel.

District of Columbia, City of Washington:

John B. Hyde, being duly sworn, makes oath and says that he mailed by United States Registered Mail copies of the foregoing Statement as to Jurisdiction on Appeal, to counsel of record for the appellees on the 5th day of August, 1929.

JOHN B. HYDE.

Sworn to and subscribed before me this the 5th day of August, 1929.

P. K. HOWARD,
Notary Public.

My commission expires May 29, 1930.

FILE COPY

Office Supreme Court
FILED
DEC 4
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 8

MEMPHIS & CHARLESTON RAILWAY COMPANY, *Appellant*,

v.

C. L. PACE, G. C. STEPHENS, R. C. GRISHAM, ET AL.,
Appellees.

Appeal from the Supreme Court of the State of Mississippi.

BRIEF FOR APPELLANT.

S. R. PRINCE,
JOHN B. HYDE,
Attorneys for Appellant.

L. E. JEFFRIES,
ELY B. MITCHELL,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 276.

MEMPHIS & CHARLESTON RAILWAY COMPANY, *Appellant*,

v.

C. L. PACE, G. C. STEPHENS, R. C. GRISHAM, ET AL., *Appellees.*

Appeal from the Supreme Court of the State of Mississippi.

BRIEF FOR APPELLANT.

May It Please the Court:

STATEMENT OF THE CASE.

I.

The Questions Involved.

This is an attack by the Memphis & Charleston Railway Company on the validity of a special road improvement assessment against it growing out of the

creation of the Oldham Road District of Tishomingo County, Mississippi. The questions involved are as follows:

May a state, conformably with the due process and equal protection clauses of the Fourteenth Amendment, permit the carving out of haphazard, superimposed and overlapping special road improvement taxing districts, without limitation as to area, or amount of pyramided special taxes to be imposed, and

(1) impose a special assessment on all the property therein, personal as well as real, not in proportion to benefit, but in blind obedience to the criterion of general assessed values; and

(2) is not such special assessment palpably arbitrary and unreasonably discriminatory when the Memphis & Charleston Railway Company is assessed 62.39 per cent. of the cost of improving the Oldham road; when it owns only 1.9 per cent. of the acreage in the Oldham district; when its property is not benefited in the slightest by the improvement, though the other acreage has been increased in value 100 per cent.; when its acreage is assessed 83 times more than that of the other property owners; when the boundaries of the district have been so deliberately and expressly fixed as to include therein nearly a mile of additional right of way out of a total of less than three miles, though no part of the improved road lies within the additional section of land so included?

II.

Opinion of the Court Below.

This case is reported as *Memphis & Charleston Railway Co. v. Bullen*, —— Miss. ——, 121 Sou. 826, a copy of the opinions of the Supreme Court of Mississippi appearing at R. 211-215, and 231-247, herein.

III.

Jurisdiction of This Court.

Jurisdiction of this Court on appeal is invoked under Section 237a of the Judicial Code of the United States, as amended by the Act of February 13, 1925 (43 Stat. 937), 28 U. S. C. 344a (as in effect prior to the Act of January 31, 1928, 28 U. S. C. 861a, 861b, Chapter 14, 45 Stat. 54, or the amendatory Act of April 26, 1928, 28 U. S. C. 861b, Chapter 440, 45 Stat. 466), and pursuant to the provisions of the said last two mentioned acts of the year 1928.

IV.

History of This Suit.

This suit was instituted in the Chancery Court of Tishomingo County by bill filed on May 13, 1927, by appellant, the Memphis & Charleston Railway Co., a part of the Southern Railway System, seeking to enjoin the levy against the railroad of a special and local road district assessment, imposed on it by reason of its right of way being included in the boundaries of said special district, known as the Oldham Road District of said Tishomingo County. The bill attacked the constitutionality of Chapter 277, Laws of Mississippi of 1920, as being violative of appellant's rights under the Fourteenth Amendment. (Bill, R. 3-18.)

The defendants, being the Sheriff and Tax Collector, and the members of the Board of Supervisors, being the governing body of the County, filed their amended answer in the cause on December 12, 1927 (Answer, R. 18-35); a trial on the merits in the Chancery Court resulting in a decision on February 11, 1928, adverse to the railroad (Decree, R. 198-199).

The railroad appealed the case to the Supreme Court of Mississippi, the highest court of the State, assigning errors (Assignments of Error, R. 206-209), which court, through Division B thereof, rendered an opinion on December 22, 1928, affirming the court below (Opinion, R. 211-215).

Both appellant and appellees then filed Suggestions of Error (R. 215-230) pursuant to the rules of the court, and said court, having vacated its first decree, called for and heard a re-argument of the cause and thereafter, on April 15, 1929, a majority of the court, *en banc*, rendered an opinion again affirming the court below (R. 231-241), one of the judges filing a separate opinion specially concurring (R. 241-244), the Chief Justice filing a dissenting opinion (R. 244-247).

From the final judgment of April 15, 1929, the appellant filed its Petition for Appeal to this Court on July 8, 1929, which was allowed by the Chief Justice of the Mississippi court on that date. (R. 247-251.)

V.

The Facts.

The Mississippi System of Road Improvement.

Mississippi counties are each divided into five constitutional governmental subdivisions known as "Supervisor's Districts" (*Sec. 170, Constitution of Mississippi of 1890,* and *Sec. 3961, Hemingway's Code of 1927*). Counties issue road bonds (*Sec. 4007 Hemingway's Code*).

In addition to *county* road bonds, the creation of *special, superimposed and overlapping districts* for special taxation and the issuance of special road im-

provement bonds thereby is permitted by *Chapter 277, Laws of 1920* hereinafter discussed.

Such special taxing district *may* be composed of one or more Supervisor's Districts (Section 1, Chapter 277, Laws of 1920) but they are not so restricted, for the act, by its express terms, and as construed by the Supreme Court of the state in the decision herein appealed from, allows such districts to be arbitrarily carved out from any part of the county, and to be superimposed upon and to overlap any other special road district. Sec. 22 of the act provides:

> "Sec. 22. *A separate road district may be created from two or more districts or parts of two or more districts heretofore or hereafter created in the same manner and with same powers as are herein provided for the original districts,* but the creation of a district from two or more districts or parts of two or more districts *shall not release the territory or taxable property or persons of the former districts from assessments for the benefit and purposes of the original districts,* nor impair or in any wise release the property or persons in the new district so created from assessment and liability for the payment of the debts and obligations of the original districts; and the creation of such new district from two or more districts, or parts of districts already formed shall in no wise change the lines or territorial construction and integrity of the original districts from which such new district may be formed." (Italics added.) Sec. 22, Chap. 277, Laws of 1920.

As decided by the court below in this case, and also in *Prather v. Googe*, 108 Miss. 670, there is no limitation on the *area* to be included in such special and local districts (the law having no power to *modify* the

proposed boundaries of the district as selected by the 20 per cent. of the voters desiring the district), and there is no limitation on the *amount of the assessment* on the property in such special district except the maximum of 15 per cent. of the assessed valuation *of the property therein, without regard to or credit for prior bonded indebtedness which may have been imposed on such property by prior districts within which such property may have theretofore been included.* That is, the court below held that each special district could issue its own bonds up to 15 per cent. of the assessed values of the property therein, no matter whether other prior districts covering the same area had theretofore issued their bonds up to 15 per cent. of the assessed values *of the same property.*

Sec. 3, Chap. 277, Laws of 1920 (R. 139-150).
See Tenth Assignment of Error to the Supreme Court of Mississippi, R. 208.
Memphis & Charleston Ry. Co. v. Bullen, supra.

The Creation and Physical Aspects of the Special District.

The Oldham Road District is a specially created local taxing district organized pursuant to the provisions of Chapter 277, Laws of 1920 (R. 139-150), aforesaid, which provides for the creation of such special road districts, initiated by petition of 20 per cent. of the qualified voters in the territory selected by them for special taxing purposes, and it provides that after a favorable vote of such voters, the Board of Supervisors, who constitute the governing body of the county, shall organize the special district, *comprising only the boundaries expressly named in the original pe-*

tition, and issue the bonds thereof, the proceeds of which are to be used *only for the construction and maintenance of specially designated roads in the district.* (Chapter 277, Laws of 1920, Secs. 1-6, R. 139-143.)

The act provides in Section 4 that there shall be levied annually "*a special tax upon all the taxable property of such district * * * to be used exclusively in paying the interest on such bonds, and providing a sinking fund for their redemption,*" the assessment against such property for this purpose to be on the value thereof as assessed *for general taxation*, as provided in Section 9 of the act. (R. 145.)

Pursuant to such provisions, on January 4, 1926, 20 per cent. of the twenty-two qualified voters of a sparsely settled rural region of Tishomingo County filed an initiatory petition praying for the creation of the Oldham District (R. 38), describing and fixing its boundaries by metes and bounds so as to include in all 2,950 acres of land through which appellant's railroad runs diagonally, *the railroad's acreage in the district comprising 57.79 acres, or only 1.9 per cent. of the total acreage.* (R. 69-70.)

Following the filing of the petition, the other steps prescribed by the act were taken, including an election in which twenty-two voters participated, 19 voting in favor of, and 3 against the creation of the district; the district was organized (Minutes of the Board of Supervisors, R. 39-60) and issued and sold its bonds, in the amount of $6,500.00, on February 4, 1926 (Ibid.).

The Oldham District so created lies concentrically within the following taxing units, the County and the First Supervisors District being *general* governmental subdivisions for purposes of taxation, and the Lee

Highway District being *a specially created local taxing district,* all of which units had issued road bonds prior to the creation of Oldham District:

Taxing District	*Road Bonds Issued*
Tishomingo County	$300,000.00
First Supervisor's District	123,000.00
Lee Highway District	100,000.00
Oldham Road District	6,500.00

(R. 117.)

In addition to these road districts, the Oldham District lies wholly within a special school district called the Snowdown District, which had also issued special bonds of $3,500.00 prior to the Oldham District's organization (R. 117).

The haphazard and overlapping nature of such special road districts, created under Chapter 277, Laws of 1920, graphically appears from the plat reproduced at page 204 of the Record, which shows in contrasting colors that the Oldham District, colored solidly in orange, lies within the Snowdown District, which lies within the Lee Highway District, which comprises the First Supervisor's District (and another special district), which First District in turn is within, and a recognized subdivision of, the County. (R. 204.)

A plat of the Oldham Road District is also reproduced in the Record at page 204. The boundaries thereof, as fixed in the original petition of the voters, are shown in orange color, and comprise all of Sections 27, 28, 33 and 34, *and also fractional parts of Sections 20 and 29.* No parts of the Oldham roads are constructed within that part of Section 29 included in the District, but the effect of including this acreage of Section 29 therein, and of fixing the boundary of the road

district through the same *as "the southern boundary line" of the railroad's right of way* (Description of District, R. 39) *had the effect of increasing the railroad's mileage in the Oldham District by 8/10 miles of main track, or an increase in assessable mileage of 35 per cent.* (R. 71 and 82), *thus increasing the railroad's assessment at the State Tax Commission's rate of $35,000.00 per mile, hereinafter referred to, by $28,000.00.* (Ibid.)

Just north of the Oldham District lies a main road running from east to west, indicated in green on the map, known as the Free Bridge Road, which leads immediately to the town of Iuka, the county seat, about two or two and a quarter miles west of the west boundary of the District, from which town all railroad shipments are billed, *there being no station facilities in the District* (Test Davis, R. 71-72; Test. Allen, R. 168, 175).

Parallel to and only about two miles south of the Free Bridge Road, and running through the southern part of the District, lies the Lee Highway, shown on the map in yellow color, which runs also directly into Iuka, and is moreover the well known main artery for automotive travel all through Alabama and Mississippi to the West (Test. Davis, R. 72), *both it and the Free Bridge Road being improved highways prior to the creation of the Oldham District* (Ibid.).

The right of way of the appellant railroad, included in the District, is 2.88 miles long, and also runs generally from east to west; as shown in brown on the map, being substantially paralleled by the two main highways mentioned above (Map, R. 204).

Within the Oldham District is the Snowdown School, constructed by the school district of that name. (Map, R. 204.)

The Oldham District's roads, constructed from the proceeds of the bond issue, *are shown in red on the map* and consist of a little neighborhood road only 2¾ miles long connecting the Lee Highway with the Free Bridge Road, and a local branch, three quarters of a mile long, running to the property of the Allen Gravel Co. (Map, R. 204.) It is for the improvement of these already existing neighborhood and local roads, so shown in red on the map, that the appellant has been assessed to the extent hereinafter shown. (Test. Davis, R. 72.)

The Basis of the Special Assessment Within the Oldham District.

Now, as has been stated, Chapter 277, Laws of 1920, adopts as a basis for special road district taxation *the general property assessments for general ad valorem taxation* (R. 145), there being included in such assessments *personalty* as well as *realty* (Test. Freeman, Ex. B, R. 120).

Individuals and corporations in Mississippi other than public utility corporations are assessed by the county tax assessors (Chapter 177, Hemingway's Code of 1927), while railroads, on the other hand, are assessed solely by the State Tax Commission. (Chapter 192, Hemingway's Code of 1927, R. 150-159.)

In accordance with the above law the State Tax Commission made its final assessment against the appellant on the basis of $35,000 per main track mile and $4,500 per side track mile for all mileage in the state and certified its assessment on this basis to the county for such mileage of the appellant as lay within the county. (R., 118-123.

On June 2, 1926, *long after the Oldham bonds were issued and sold,* appellant received its first notice of

the organization of the Oldham District when it was requested by the State Tax Commission to show what part of its property lay within the same (R., 128-132). In obedience to such request, on July 23, 1926, appellant furnished a mechanical separation of its property by special districts to the Commission, and the Commission afterwards allocated the same and certified to Tishomingo County the amount of $113,200 as being the amount of assessable property belonging to the appellant within the Oldham District, *that amount being the present assessment attacked in this case.* (Exhibit "F" to Bullen's testimony, R., 204, and R., 117-118.)

The total assessment of all property within the Oldham District for 1926 was as follows:

Item	*Assessed Value*
Realty	$26,730
Personalty	35,070
Memphis & Charleston Ry. Co.	113,200
S. E. Exp.	115
W. U. Tel. Co.	1,556
Cumb. T. & T. Co.	1,958
Pullman Co.	1,219
A. T. & T. Co.	1,600
Total	$181,448

(Exhibit "B" to Freeman's Testimony, R. 120.)

The percentages of taxes assessed against the appellant in the County and its road taxing subdivisions for 1926 were as follows:

Subdivision	Total Valuation as of Feb. 1, 1926	Valuation M. & C. Ry. Feb. 1, 1926	Ratio M. & C. to whole
Tishomingo County	$4,196,493	$629,065	14.99%
1st Superv. District	1,249,516	373,235	27.87%
Lee Highway District	1,692,481	629,065	37.16%
Oldham Road District	181,446	113,200	62.39%

(Exhibit "B" to Freeman's Testimony, R. 120.)

It is seen from the foregoing that, *though appellant owns only 1.9 per cent. of the acreage, it is assessed 62.39 per cent. of the taxes within the District* (R. 120).

It is also undisputed that, though no other corporation and no individual pays on an assessment for intangibles within the District (except one man who is assessed on $150 of intangibles (R. 121), the appellant's assessment includes an undetermined and undisclosed amount for intangible or "franchise" value (R. 118), or, as is stated on the form promulgated by the State Commission: "*First main track includes value of waylands, station grounds, yards, road bed, bridges, rolling stock, block system, telephone and telegraph lines and franchise.*" (Exhibit "F" to Bullen's Testimony, R. 204.)

The individual land owners and certain corporations in the District thus own 2,892 acres, and their combined assessments for these special benefit taxes amount only to $68,248, while appellant, which owns 58 acres, is assessed $113,200 or 62 per cent. of the whole amount. Considered as acreage alone the assessment against appellant is on a basis of $1,958 per acre, while all the other lands are assessed on a basis of $23 per acre, *the railroad's assessment being 83 times as great per acre.* (R. 121-122.)

As has been stated, in the organization of the District the boundaries were so chosen as to include there-

in part of Sec. 29, though no part of the Oldham roads afterward constructed by the District lie within these sections; and the boundary through this section was specifically fixed *so as to include the right of way of appellant* through that part of Sec. 29 included in the District, the fixing of this boundary thus having the effect of including within the District 8/10 miles additional of main track mileage, which, as has been stated, at $35,000 per mile, increased the assessment against the railroad by $28,000.00 (R. 82).

The District's Roads do Not Benefit the Appellant.

As has been seen, the money derived from the sale of the Oldham bonds was used to straighten and improve a neighborhood road of about 2¾ miles in length with a fork of about ¾ miles, shown in red on the Plat Exhibit "A". These roads serve to connect the two improved highways, the Lee Highway and the Free Bridge Road, which run west into Iuka, parallel to each other and at a distance apart of about 2 miles, the two forks of the Oldham roads connecting with the Lee Highway at Oldham and at Gravel Siding, at each of which places are gravel pits which produce gravel in car load quantities which is shipped therefrom over the railroad of appellant. (R. 71-75.)

These Oldham roads are a great convenience *to the neighborhood and residents of the District* (R. 74-75), and are of direct benefit to the corporations owning the gravel pits, and there is testimony to the effect that their construction served to allay labor discontent at the gravel pits (R. 166-167), which have always since 1913 and 1914 produced a large gross revenue per annum to the appellant (R. 164 and 169). *But the labor unrest was largely produced by the lack of schools* (R.

166), and in the Snowdown School District, which was created a short time before the creation of the Oldham District, and overlaps the same, the appellant is assessed for and pays a large proportion (R. 75), from 60 per cent. to 72 per cent., of the Snowdown District taxes (R. 74 and 186). The Snowdown school house is within the Oldham District (Plat, R. 204).

There are no station facilities on appellant's railroad within the District, only freight in carload lots being shipped from the sidings at Oldham and Gravel Pit, all such shipments being billed from Iuka, about two miles west, and outside, of the District (R. 72, 168, 175).

The Oldham road does not tap any new or undeveloped territory, being an improvement, *only 2¾ miles in extreme length*, of a heretofore existing neighborhood road. (R. 72.)

The shipments from the inexhaustible gravel pits (R. 177) were somewhat larger in 1926 than in some previous years, but this was due to the large increase in building gravel roads in Mississippi and to the necessity of rehabilitating gravel roads in the Mississippi Delta destroyed in the floods. The Lee Highway, for the bonds of which the appellant pays 37.16 per cent. of the assessment (R. 120), runs through one, and within 200 yards of the other, gravel pit. (See Plat, R. 204, Test. Allen, R. 169.)

An occasional shipment of lumber has been made from Morrison's spur, which is not within the District, but access to which is facilitated somewhat by the improvement of the Oldham road, as well as from the gravel siding, both before as well as since, the organization of the District (R. 171, 184). But no shipments of lumber were made in the year 1926 and 1927. (R. 185.)

The town of Iuka is closer, by the Free Bridge Road, to a large part of the District than either of the gravel sidings or Morrison's spur (R. 175), and all agricultural and lumber products of the District, to be shipped by railroad, are still hauled to Iuka, as before the construction of the Oldham road. (R. 175.)

Farm lands in the District have been directly benefited by the Oldham road *to the extent of a 100 per cent, enhancement in value* (R. 186), *but there is no evidence of any enhancement in value of appellant's property in the District.*

On this point the witnesses say:*

Appellant's civil engineer Davis says:

> "Q. State whether or not from your observation and from the physical features which you have described, the construction of the Oldham roads would tend to decrease or increase freight and passenger traffic on the Memphis & Charleston Railway Co.?
>
> "A. My personal observation, they would have no effect whatsoever on the freight or passenger traffic, either by increasing or decreasing it."
>
> **(R. 73.)**

Appellant's superintendent Blackwell says:

> "Q. What effect, Mr. Blackwell, has the construction of those two roads up there in the Oldham Road District, of increasing the earning capacity of the Memphis & Charleston Railway Co., in this particular vicinity, or in that District?

*NOTE: Since this Court determines for itself the *fact* of whether a special imposition is arbitrary and discriminatory under the Fourteenth Amendment, and has heretofore, in *Road Improvement District No. 1 v. Missouri Pacific R. Co.*, 274 U. S. 188, and other cases, examined and quoted the testimony with regard to benefits, appellant has felt it necessary to set out *verbatim* the material testimony in the record on this vital point.

"A. In my opinion, it has not increased it any.

* * * * * * * * *

"Q. I will ask you whether or not the construction of those two roads in the Oldham Road District had any tendency whatever to increase the tonnage of gravel as hauled from those two pits?

"A. Certainly not."

(R. 86.)

Superintendent Rice of the M. & O. R. R. Co. says:

"Q. Mr. Rice, assuming that this is Oldham District, consisting of about 3,000 acres of land, and this road runs down to Oldham Gravel Pit, and that this road runs down to Allen Gravel Pit, and there is no depot in this territory, and all the gravel is billed out in Iuka, what effect would those two small roads have on the revenue of the Memphis & Charleston Railroad?

"A. I don't see why would be of any benefit."

(R. 94.)

Train master Foreline of the M. & O. R. R. Co. says:

"Q. Mr. Foreline, if Oldham Road District is located out east of Iuka, here, and there is a main thoroughfare, as indicated by this blue print up here, known as the Free Bridge road and one on the South, and parallel to the right of way of the Southern Railway Company, through this district, what benefit, as to revenues, would you say the construction of these two small roads in this territory, would have on Memphis & Charleston Railway Co.?

"A. One point that seems—

"Q. I say, what effect would it have on the increase or decrease in revenue, situated as it is here at Iuka and no depot in the territory?

"A. No depot on the railroad where comes on the railroad—no loading track or facilities?

"Q. Yes?

"A. Have no effect whatever."

(R. 100.)

Appellant's Freight Agent White says:

"Q. Mr. White, what effect has the building of hard surface roads had upon the local shipments of freight?

"A. Well, I would say that they have tended to materially decrease the Southern Railroad's revenues."

(R. 106.)

The only testimony on the part of the defendants in the record as to benefits to the appellant's railroad due to the improvement of the Oldham road is that of Mr. Allen, *Manager of the Allen Gravel Co.* (R. 161), and of Mr. Gains, a banker of the town of Iuka, *who bought the Oldham District's bonds for a customer of his bank* (R. 179).

Mr. Allen says:

"Q. What has been the effect of this improvement out there on the development of the community, farms and farm houses and fields and lands?

"A. Been considerable improvement in the way of farm houses being built, and been a little mercantile business established out there and a Dairy established since the road was built; been considerable acreage cleared up.

"Q. What effect does that have on the revenues of the railroad in that community?

"A. *I could not say exactly,* what the exact revenues has been, but the general revenues has been increased on account of that."

(R. 168, italics added.)

Mr. Gains says:

"Q. What did you say?

"A. I said I considered that land in the Oldham Road district—been benefited 100%.

"Q. In other words, that land is worth twice as much now as in 1926?

"A. I would consider it easily so, yes, sir.

"Q. How about the other land out there?

"A. Well I am speaking of the land in Oldham District.

"Q. You believe all the farming land has been benefited 100% by this road district?

"A. I did not say all, but speaking up and down the road and next to the school building and church.

"Q. You think the Railroad was benefited twice as much as the property owners who live along this road, where the road is built?

"A. Quite sure they have been benefited, *but I could not say to what extent.*

"Q. Now there is a general, not only in this Oldham Road District, but in all communities in Tishomingo County, particularly, there is a development of schools and churches is there not?

"A. Ask that again?

"Q. Throughout Tishomingo County, there is a general development of schools and churches, is there not?

"A. Not throughout the county, no, sir.

"Q. Well, greater portion of the county?

"A. Biggest portion, yes, sir; I think 40 or 50 per cent, may be 60 per cent.

"Q. And a greater development of roads throughout this county?

"A. In 60 per cent of it, yes, sir.

"Q. And this is a necessary development that is going on in a general way in the county?

"A. Not all over the county.

"Q. I say in the biggest part of it?

"A. Where—got good roads and consolidated schools, yes, sir.

"Q. You mean to say that the right of way of the railroad is specially benefited by the construction of these roads in Oldham Road District?

"A. Well, I did not say that, I don't think.

"Q. Just a general benefit to the community?

"A. I think they have been benefited from the increase of revenues that is shipped from out there, yes, sir."

(R. 186-187, italics added.)

The above testimony is all of the material testimony in the record on the question of benefits to the appellant, and it is on this testimony alone that the trial judge below erroneously concluded that the same showed indirectly that the improvement of the road would tend directly "to *slightly* increase the revenues of the railroad," in that it opened up a small territory which had furnished, and would probably continue to furnish, a comparatively small amount of lumber for shipment, and would be of indirect benefit in that it would have a tendency to settle labor conditions and aid in the operation of the gravel pits. (Opinion of the Chancellor, R., 195-196.)

This clearly erroneous conclusion as to the effect of the above testimony is repeated in the opinion of the majority of the supreme court below, where that court again held, clearly in error, that the improvement of the Oldham roads would be both of direct and indirect benefit to the appellant. (Final Opinion of the Court Below, R., 240.)

It is significant that the two gravel companies, though benefited more than anyone else by the construction of the Oldham road, according to Mr. Allen's testimony, *are each assessed only about 8 per cent of*

the total assessment (R. 67 and 120), *as contrasted with the 62.39 per cent with which the railroad is assessed* (R. 120).

Local freight and passenger business of appellant has decreased from 40 per cent to 60 per cent between 1923 and 1927, due to automobile and truck competition (R. 85, 94, 107).

All the evidence points to the unescapable conclusion that the Oldham District is a neighborhood project, initiated by 27 per cent of 22 voters, or only 6 individuals, for the sake of improving, and for the direct benefit only of the persons directly interested in, this little rural district, in the boundaries of which the railroad's right of way was included because thereby the railroad could be forced to bear almost two-thirds of the cost of the road, *of no benefit whatsoever to itself.*

The Validating Acts.

On January 4, 1926 (the very day the petition of the voters to create the Oldham District was filed), this Court rendered its opinion in the case of *Browning v. Hooper,* 269 U. S. 396, which declared a road district statute of Texas, very similar to Chapter 277, Laws of Mississippi of 1920, unconstitutional in its application to the parties to that suit; and, concerned for the validity of the special districts which had been organized in Mississippi, the Legislature of that State immediately began to pass special and general acts purporting to validate such districts, among them a special act, Chapter 1080, Laws of 1926, entitled, "An Act to Validate the Organization of the Oldham Road District" (R. 193-195), and Chapter 278, Laws of 1926 (R. 189-192), being a blanket act purporting to validate *all* special road districts theretofore organized

for which a special validating act had been passed at the 1926 session of the Legislature.

VI.

The Holding of the Court Below and the Issues of Law Before This Court.

Appellant's attack on the validity of the assessment was based, in the trial court, and in the Supreme Court of Mississippi, in addition to the Federal constitutional grounds hereinafter to be stated and urged in this Court, on many points of invalidity under the Mississippi laws and constitution, any discussion of which is foreclosed and rendered unnecessary by the opinion below, overruling appellant's contentions in that regard.

Appellant contended vigorously in the trial court below and in the Supreme Court of Mississippi, both on the original hearing and on re-argument, that Chapter 277, Laws of 1920, was violative of the due process clause of the Fourteenth Amendment in that where a special district was organized, as this one was, without notice or a right to hearing, appellant's constitutional rights were violated. In the first opinion of the supreme court below this contention of the appellant was assumed to be correct, but the court held that the validating acts cured this invalidity. After rehearing, in the final opinion of the majority of the court, it was held that because the Board of Supervisors had a right to *deny* the petition of the voters asking for the organization of the district, such district was the equivalent of a legislative district. From this holding of the majority, the chief justice of the court below vigorously dissented upon the ground that

the Board of Supervisors had no authority under the statute to deny such petition.

Appellant feels that from a practical standpoint the organization of the district and the assessment against it growing out of such organization does actually have the effect of taking its property without due process of law under the principles enunciated by this Court, particularly in *Browning v. Hooper,* 269 U. S. 396.

If such construction of the laws and statutes of the State by the State's highest court is binding here, appellant concedes that it is no longer possible to discuss in this Court any question relating to the technical validity of the original creation of the special district nor to the constitutionality of the validating acts *per se,* except as they purposely ratify and approve the scheme of special taxation imposed by the original act, Chapter 277, Laws of 1920.

If the decision below is binding here, it places the assessment against the appellant on the same plane legally as if it had been made originally by an express legislative enactment, and we therefore proceed to discuss the two principal issues in the case, first urged by the appellant in its bill, and successively argued before the trial and appellant courts below, namely:

> (1) May a state legislature, conformably with the rights afforded by the due process and equal protection clauses of the Fourteenth Amendment, carve out haphazard and overlapping territories superimposed over, and within and without the boundaries of recognized governmental subdivisions, for special road district taxation, and impose special assessments on all the property so arbitrarily selected and included therein, not in proportion to the benefits conferred on such property, but solely in proportion as such property

chances to be assessed for general purposes of taxation, including in such assessed values, personalty as well as realty?

(2) Is the assessment against the appellant in this case, imposed by force of the legislative authority contained in Chapter 277, Laws of Mississippi of 1920, and the Acts purporting to validate the proceedings thereunder; to wit, Chapters 278 and 1080, Laws of Mississippi of 1926, as construed by the Supreme Court of Mississippi, so plainly and palpably arbitrary, so grossly excessive in amount, so unreasonably discriminatory, and such a plain abuse as that it violates the protection afforded appellant by the due process and equal protection clauses of the Fourteenth Amendment?

The Supreme Court of the State, through the opinion of the majority *en banc*, answered the above questions in the *negative*, and thus upheld the validity of the above mentioned statutes of the State against the claim of the appellant that they were repugnant, as applied to appellant, to the Fourteenth Amendment to the Constitution.

ASSIGNMENTS OF ERROR.

First.

The Supreme Court of the State of Mississippi erred in holding that Chapter 277, Laws of Mississippi of 1920, and the acts purporting to validate the proceedings thereunder; to wit, Chapters 278 and 1080, Laws of Mississippi of 1926, and the proceedings pursuant thereto, whereunder the Oldham Road District was organized and purported to be validated, resulting in the assessment against appellant attacked herein, are, as applied to appellant, valid; the error being that said

laws are, and each of them is, and all of said proceedings are, unconstitutional and void, taking appellant's property without due process of law and denying to appellant the equal protection of the law, in violation of appellant's rights under the Fourteenth Amendment to the Constitution of the United States, in that under the terms of said statutes there is imposed special taxation upon all the property, personal as well as real, within the boundaries of the special road district organized thereunder, not in proportion to the specific benefits to such property, but on the basis of the valuation thereof for general purposes of taxation, such basis being palpably arbitrary and discriminatory; and in any event the inclusion of personal property in said assessment is capricious, arbitrary, and discriminatory; the said personal property in said district not being benefited at all by the local improvement for which the tax is assessed.

Second.

The Supreme Court of the State of Mississippi erred in holding that Chapter 277, Laws of Mississippi of 1920, and the acts purporting to validate the proceedings thereunder; to wit, Chapters 278 and 1080, Laws of Mississippi of 1926, and the proceedings pursuant thereto, whereunder the Oldham Road District was organized and purported to be validated, resulting in the assessment against the appellant attacked herein, are, as applied to appellant, valid; the error being that said laws and proceedings are unconstitutional and void, taking appellant's property without due process of law and denying to appellant the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, in that said

assessment, made pursuant to the provisions of said laws, is so plainly and palpably arbitrary, is so grossly excessive in amount, is so unreaonably discriminatory, and is such a plain abuse as that it violates appellant's constitutional rights aforesaid.

BRIEF.

I.

Even though the Supreme Court of Mississippi may have characterized the district as "an ad valorem taxing district and not a special benefit assessment district," such characterization of the nature of the tax imposed is not binding on the Supreme Court of the United States.

Louisville Gas & E. Co. v. Coleman, 277 U. S. 32
Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389

Under the facts hereinbefore set forth, there is no question but that the assessment against the appellant is a special assessment for a local improvement under the holding of this court in the following cases:

Illinois Central Railroad Co. v. City of Decatur, 147 U. S. 190
Embree v. Kansas City Road District, 240 U. S. 242
Browning v. Hooper, 269 U. S. 396

Assuming that the special and local assessment attacked is the same as if made by the legislature itself, it is nevertheless always competent for the Court to enquire whether the legislative determination is so palpably arbitrary and so plainly abusive as to offend the due process clause of the Fourteenth Amendment.

Spencer v. Merchant, 125 U. S. 345
French v. Barber Asphalt Paving Co., 181 U. S. 324
Houck v. Little River Drainage Dist., 239 U. S. 254
Myles Salt Co. v. Iberia Drainage Dist., 239 U. S. 478
Embree v. Kansas City Road District, supra
Branson v. Bush, 251 U. S. 182
Valley Farms Co. v. County of Westchester, 261 U. S. 155
Thomas v. Kansas City Southern Ry. Co., 261 U. S. 481
Kansas City Southern R. Co. v. Road Improv. Dist. No. 3, 266 U. S. 379
Road Improvement Dist. No. 1 v. Missouri Pac. R. Co., 274 U. S. 188
Standard Pipe Line Co. v. Miller County Highway District, 277 U. S. 160

And though the assessment be made by the legislature itself, the Court may always enquire whether there is such manifest and unreasonable discrimination in fixing the benefits which the property will receive that the legislative determination contravenes the equal protection clause of the same Amendment.

Kansas City Southern R. Co. v. Road Improv. District No. 6, 256 U. S. 658
Thomas v. Kansas City Southern Ry. Co., supra
Kansas City Southern R. Co. v. Road Improv. Dist. No. 3, supra
Road Improvement Dist. No. 1 v. Missouri Pac. R. Co., supra
Standard Pipe Line Co. v. Miller County Highway District, supra

Such enquiry is always competent, irrespective of whether or not the legislature determines that the spe-

cial assessment for the improvement shall be based upon the general ad valorem assessed values, or in proportion to specific benefits to be found by a subordinate authority.

Thomas v. Kansas City Southern Ry. Co., supra
Kansas City Southern R. Co. v. Road Improv. Dist. No. 3, supra
Browning v. Hooper, supra

Chapter 277, Laws of Mississippi of 1920, permits the creation of *special and overlapping* road districts for local road improvement purposes without any limitation, and allows the imposition on all property, real and personal, arbitrarily selected for inclusion therein, of special improvement assessments, based not in proportion to the benefits conferred, but only upon the general ad valorem assessed values.

Chapter 277, Laws of Mississippi of 1920, particularly Sections 9 and 22.
Memphis & Charleston Railway Co. v. Bullen, —— Miss. ——, 121 So. 826

The Mississippi road improvement system is clearly distinguishable from the orderly and systematic division of territory permitted under the Louisiana laws as distinguished and approved by this Court in:

St. Louis & S. W. Ry. Co. v. Nattin, 277 U. S. 157

In the case of a special district organized in Mississippi under the machinery of Chapter 277, Laws of 1920, the purposes and objects of the improvement being purely local and special, the validity of the spe-

cial assessment depends upon the receipt of benefit, and if the imposition is palpably arbitrary and manifestly discriminatory, it offends against both the due process and the equal protection clauses of the Fourteenth Amendment, *even though the tax be based upon general ad valorem assessed values.*

Valley Farms Co. v. County of Westchester, supra
Thomas v. Kansas City Southern Ry. Co., supra
Kansas City Southern R. Co. v. Road Improv. Dist. No. 3, supra
Missouri Pac. Ry. Co. v. Road Improv. Dist., 288 F. 502
Kansas City Southern R. Co. v. Ogden Levee Dist., 15 F. (2d) 637
In Re Chicago R. I. & P. Ry. Co., 28 F. (2d) 56
Missouri Pac. R. Co. v. Mitchell County, 110 Kan. 582, 204 P. 729

In such a district, created for special and local improvement, the adoption by the legislature of the general ad valorem assessments of all property, personal as well as real, as the basis for the special assessments is, in itself and of its own force, so inherently lacking in the probability of producing even an approximately correct result as that it is repugnant to the rights afforded the taxpayer by the due process and equal protection clauses of the Amendment.

Gast Realty & Invest. Co. v. Schneider Granite Co., 240 U. S. 55
Kansas City Southern R. Co. v. Road Improv. District, No. 6, *supra.*
Thomas v. Kansas City Southern Ry. Co. (opinion in lower court, 277 F. 708), *supra*
Kansas City Southern R. Co. v. Ogden Levee Dist., supra

In Re Chicago, R. I. & P. Ry. Co., supra
Atchison T. & S. F. Ry. Co. v. Anderson County, 120 Kan. 240, 243 P. 282
Hesse-Rix Co. v. Krug, 319 Mo. 880, 6 S. W. (2d) 570

II.

Where an assessment for a special and local improvement is palpably arbitrary and constitutes a plain abuse, and is manifestly and unreasonably discriminatory, *to the extent shown in this case with reference to the assessment against the appellant attacked herein,* it is void as offending against the due process and equal protection clauses of the Fourteenth Amendment.

Thomas v. Kansas City Southern Ry. Co., supra
Kansas City Southern R. Co. v. Road Improv. Dist. No. 3, supra
Road Improvement Dist. No. 1 v. Missouri Pac. R. Co., supra
Standard Pipe Line Co. v. Miller County Highway Dist., supra
Missouri Pac. Ry. Co. v. Road Improv. Dist., supra
Kansas City Southern Ry. Co. v. May, 2 F. (2d) 680
Kansas City Southern R. Co. v. Ogden Levee Dist., supra
In Re Chicago, R. I. & P. Ry. Co., supra
Missouri Pac. R. Co. v. Mitchell County, supra
Atchison T. & S. F. Ry. Co. v. Anderson County, supra
Hesse-Rix Co. v. Krug, supra

ARGUMENT.

Introductory.

The essential matter for determination in this case is, preliminarily, the character of the assessment imposed upon the appellant, and then, it having been found to be a special assessment for a local improvement, the question is—is such assessment, under the facts, violative of the rights afforded appellant under the Fourteenth Amendment?

Since, at least, the case of *Illinois Central R. R. Co. v. City of Decatur*, 147 U. S. 190, this Court has always sharply distinguished between *taxes*, which are therein defined to be "*the exactions placed upon the citizen for the support of the government,*" and *special assessments*, which are defined as impositions "*upon property within a limited area for the payment for a local improvement, supposed to enhance the value of all property within that area.*"

Thus the fundamental fact upon which the validity of special assessments rests is the increment of value, or the benefit, bestowed upon the property taxed, resulting from the improvement.

In the case now before the Court, as has been stated above, the Supreme Court of Mississippi has arrived at a conclusion to the effect that the assessment district attacked by the appellant herein is not a special benefit assessment district, but is an ad valorem taxing district. In the first place, such terms of attempted distinction are without legal difference under the decisions of this Court. And even if there were a legal difference, such characterization by the highest court of a state concerning the essential nature of a public imposition is not binding upon the Supreme Court of

the United States, as this Court has held in *Louisville Gas & E. Co. v. Coleman*, 277 U. S. 32, *loc. cit.* 38, where it is said:

> "* * * we are not bound by the characterization of the tax by the state court * * *."

See, to similar effect, *Quaker City Cab Co. v. Pennsylvania, supra.* It follows, therefore, that this Court will, disregarding the form, examine the substantive features of the assessment in order itself to determine whether or not the assessment is essentially general on the one hand, or local and special, depending upon benefit for its validity, on the other.

The facts of the record, hereinbefore stated in this brief, lead to but one conclusion; namely, that this assessment, growing out of the creation of the special and local Oldham Road District, pursuant to the provisions of Chapter 277, Laws of 1920, is well nigh a perfect example of a special assessment for a peculiarly local improvement.

It is, of course, true, as this Court has said:

> "A state may defray the cost of constructing a highway, in whole or in part, by means of a special assessment upon property especially benefited thereby. But it is not obliged to do so. Road building is a public purpose which may be effected by general taxation."
>
> *Missouri Pac. R. Co. v. Western Crawford Road Improv. Dist.*, 266 U. S. 187 (*loc. cit.* 190)

And it is likewise true that where a state provides a general scheme of road improvement by means of the systematic and orderly subdivision of its territory

into recognized and non-overlapping districts, imposing general ad valorem taxes upon all the property therein, such a tax so imposed is essentially general, and is not local and special within the requirement that it must depend for its validity upon the receipt of special benefit by the taxpayer. This proposition has lately been decided by this Court after careful scrutiny of the general system of road improvement prescribed by the Constitution and laws of the State of Louisiana.

St. Louis & S. W. Ry. Co. v. Nattin, supra

As distinguished from such a system, however, the facts hereinbefore stated show without dispute that the Mississippi system provides in Chapter 277, Laws of 1920, for the creation only of typically special and local road improvement taxation districts. The facts which lead to this conclusion are:

(a) The territory to be included in such a special district is first selected by the arbitrary will of a small percentage of the voters in any portion of any county which they may personally desire to select, and the territory so selected is thereafter forever so fixed and determined, the court below having held in this case that though the governing body of the county may, in its discretion, *deny the petition* asking for the creation of the special district, neither such governing body, nor anyone else, has power under the law *to modify the boundaries* of the territory so originally selected.

Memphis & Charleston Ry. Co. v. Bullen, supra (R. 238)

(b) The act in question expressly permits the creation of superimposed and overlapping districts, with-

out any limitation whatsoever, *ad infinitum*, and expressly provides that the creation of additional and superimposed districts from all or parts of any former districts shall in no wise abrogate the integrity "of the original districts from which such new districts may be formed."

Secs. 2 and 22, Chap. 277, Laws of 1920.

(c) The funds derived from the sale of the special district's bonds may be expended only on those certain public highways adopted by the special district's commissioners for improvement, the act providing "that the public highway or highways so surveyed and adopted by such commissioners shall be constructed and maintained out of the proceeds of such bonds; proceeds of such bonds to be used alone in their construction and maintenance * * *."

Sec. 6, Chap. 277, Laws of 1920.

(d) The act as construed by the court below, permits the creation of such a district *without limitation on the amount of the bonds to be issued by it*, except that each district is prohibited from issuing its *own* bonds amounting to more than 15 per cent of the assessed values of the property *within the district itself*, but without regard to, or credit for, how many prior overlapping districts may have issued *their* bonds on the same, identical acreage, the supreme court below having expressly overruled, without comment, appellant's insistence that such pyramiding of bonded indebtedness by means of superimposed and overlapping districts was prohibited by the terms of the act.

Sec. 3, Chap. 277, Laws of 1920.
See appellant's *Tenth Assignment of Error to the Supreme Court of Mississippi* (R. 208)
Memphis & Charleston Ry. Co. v. Bullen, supra

(e) Both the Legislature of the State, and the Supreme Court, in the decision appealed from herein, have inferentially recognized that *benefit* to the property included within the special district is the criterion of the validity of the tax, as is shown by the wording of Section 22 of the act hereinbefore quoted, where it is provided that the creation of a new district from part of old districts shall not release the latter "from assessments *for the benefit and purposes of the original districts*," and as is shown in the decision below, where the majority of the court remarks that the Board of Supervisors of the County is vested with the legislative discretion of deciding "whether the *benefits* to be derived from the proposed district will be justified by the necessary tax burdens."

Sec. 22, Chap. 277, Laws of 1920.
Memphis & Charleston Ry. Co. v. Bullen, supra (*loc. cit.* 831)

Under almost identically similar facts, this Court has authoritatively held that such an assessment is special:

> "Resort may be had to general taxes and to special assessments to raise funds for the construction of improvement of roads. Missouri P. R. Co. v. Western Crawford Road Improv. Dist. 266 U. S. 187, 190, 69 L. ed. 237, 243. The proceedings in this case cannot be sustained as the levy of a general tax. The commissioners' court is authorized to levy general taxes for road

purposes up to a stated maximum on each $100 valuation. Art. 2242; Const. Art. 8, Sec. 9. The expenditure of the moneys so raised is not limited to any specified roads. And it is significant that, in the case of a road district, the court's duties in respect of the amount to be raised and the lands to be subjected to the charge are purely ministerial, and confined solely to carrying out the will of the petitioners when approved at the election. Here, on the initiation of individuals signing the petition, a special district was carved out to furnish credit and to pay for specified improvements on designated roads wholly within the territory selected. The purpose was special, and the district will cease to exist as a body corporate upon the payment of the bond debt. It is clear that the burdens here sought to be imposed on appellant's lands are special assessments for local improvements."

Browning v. Hooper, supra (*loc. cit. 403*).

Appellant thus shows that the assessment against it is a special assessment for a local improvement, and this being true, it is entitled to have this Court determine whether or not such assessment, both by reason of the force of the statutes involved, in and of themselves, and by reason of the effect of the assessment, is so palpably arbitrary that it offends the due process clause; and is so discriminatory as that it contravenes the equal protection clause of the Fourteenth Amendment. The right of this Court so to scrutinize the incidence of a special assessment, and for itself to determine whether or not the rights of the parties before it have been violated, irrespective of whether or not the basis adopted for imposing the assessment is general assessed value or special benefit, has been summed

in *Kansas City S. R. Co. v. Road Improv. Dist. No. 3, supra* (*loc. cit.* 386-7), where it is said:

> "By a long line of decisions in this court it has been settled that, where the state Constitution, as construed by the state court of last resort, does not provide otherwise, the legislature of a state may require that the cost of a local public improvement, such as the construction or reconstruction of a public road, be distributed over the lands particularly benefited, and charged against them *according to their value, their area or the benefits which they will receive;* may itself determine what lands will be benefited and in what proportions they will share in the benefits; and may avail itself, for the purposes of that determination, of any information which it deems appropriate and sufficient, including such as may be afforded by reports and estimates made in prior assessment proceedings having the same object. *Only where the legislative determination is palpably arbitrary, and therefore a plain abuse of power, can it be said to offend the due process of law clause of the 14th Amendment.* (Omitting citations.) *And only where there is manifest and unreasonable discrimination in fixing the benefits which the several parcels will receive can the legislative determination be said to contravene the equal protection clause of that Amendment.*" (Italics added.)

It having been demonstrated above, first, that the assessment is local and special, necessarily depending therefore upon the receipt of benefit for its validity, and second, that this Court will determine for itself whether or not such an assessment, even though imposed by express legislative enactment, violates the constitutional rights of the litigant invoking its jurisdiction, there remains for discussion but the one final

and the ultimate question; namely, does this particular assessment violate this appellant's constitutional rights? We may conveniently consider this question in its two aspects, stated technically in the two assignments of error set out above, but which may be more simply phrased:

(1) May the state select for local improvement an arbitrary portion of its territory and impose a special assessment on all the property therein, personal as well as real, with no reference to the benefits derived, but solely in blind obedience to the rule of general ad valorem assessed values?

(2) And, under these circumstances, is the assessment against the Memphis & Charleston Railway of 62.39 per cent of the cost of improving the Oldham road, when it owns only 1.9 per cent of the acreage in the Oldham District; when its property is not benefited in the slightest by the improvement, though the other acreage has been increased in value 100 per cent; when its acreage is assessed 83 times more than that of the other property owners; when the boundaries of the district have been so deliberately and expressly fixed as to include therein nearly a mile of additional right of way out of a total of less than three miles, though no part of the improved road lies within the additional section of land so included—is such assessment palpably arbitrary and unreasonably discriminatory?

Is the Adoption of the Ad Valorem Basis Inherently Invalid?

Let it be assumed that in a rural community in Mississippi, comprising 2950 acres, there are certain individuals who own 2892 acres, the value of which, to-

gether with their personalty, aggregates only $78,000; and that there is another resident therein whose realty amounts only to 58 acres, but by reason of his ownership of stocks, bonds and other personalty the value of all *his* property amounts to $113,000. Desiring the construction of a local road for the benefit of their land, and knowing that the system of special taxation for local road improvement in effect at the time permits the imposition of such special assessments on the assessed value of all personalty as well as realty, the owners of the 2892 acres decide to carve out the particular 2950 acres into a special district, knowing the law to be (a) that the boundaries they selected *cannot be modified*, and (b) that law *will automatically place 62 per cent. of the special taxes on the better-off owner of only 1.9 per cent. of the land*, and (c) that by fixing one boundary *south* instead of *north* of a portion of such owner's small acreage his assessment *will be automatically increased by 35 per cent.* This done, is it not true that *by force of the law itself*, the owner of the 58 acres has suffered from an imposition so arbitrary, and so discriminatory, as to be prohibited by the Fourteenth Amendment?

The authoritative opinions of the courts answer this question in the affirmative.

> "Benefits from local improvements must be estimated upon *contiguous* property *according to some standard which will probably produce approximately correct general results.*" (Italics ours.)
>
> *Kansas C. R. Co. v. Road Improvement District No. 6*, 256 U. S. 658, (*loc. cit.* 661)

"The differences were not based upon any consideration of difference in the benefits conferred, but were established mechanically in obedience to the criteria that the charter directed to be applied. The defendant's case is not an incidental result of a rule that, as a whole and on the average, may be expected to work well, but of *an ordinance that is a farrago of irrational irregularities* throughout. It is enough to say that the ordinance following the orders of the charter is bad upon its face as distributing a local tax in grossly unequal proportions, not because of special considerations applicable to the parcels taxed, but *in blind obedience to a rule that requires the result.*" (Italics ours.)

Gast Realty & Inv. Co. v. Schneider Granite Company, supra.

"While we are mindful that it is well-nigh impossible to lay down and prescribe a hard and fast rule for the establishment of special taxation districts which will not, in some instances, conflict with the Fourteenth Amendment to the Federal Constitution, and while we are also cognizant of the fact that exact uniformity and equality in assessment of lands for public improvements is not capable of human accomplishment, wherefore the courts must take a somewhat liberal view of the inequalities in assessment necessarily resulting from the application of any fixed rule of apportionment, and will not, therefore, as a general rule, give heed to complaints against a rule of apportionment which approximates justice and equality in assessment as nearly as may reasonably be possible, nevertheless, where the rule of apportionment used (as in this instance) palpably results in gross inequality of assessment, and arbitrarily, *and in blind obedience to a statutory or charter rule, distributes the burden of the cost of the improvement without regard to, or consideration of,*

> *the special benefits applicable to the several and respective parcels or tracts of land taxed, such rule of apportionment cannot be upheld,* and the special ordinance or the statute (as the case may be) which prescribes the rule of apportionment so used will be held unconstitutional, as contravening the Fourteenth Amendment to the Constitution of the United States, as against the defendant owner of the land so unequally assessed and taxed." (Italics ours.)
>
> *Hesse-Rix Co. v. Krug, supra.*

In the opinion of the Circuit Court of Appeals in the *Thomas* case, 277 F. 708, affirmed by this Court, (*Thomas v. Kansas City Southern R. Co.*, 261 U. S. 481) it is said:

> "The basis of valuation here employed for benefits is the valuation of all property within the district for general taxation. General taxation and assessment for special benefits are essentially different in their basic characteristics and their legal theories. One is grounded upon the idea that all property should bear a proportion, based upon value, of the burden of general taxation; the other is grounded upon the idea that property actually benefited by a public improvement should respond in proportion to the benefit so received. Obviously, any connection between the value of a given piece of property for general taxation and its value for benefit assessment taxation is purely accidental. Therefore the circumstance that the Legislature here took them to be identical carries no more force than if some other basis of value had been selected."

The same Eighth Circuit, in *Kansas City Southern Ry. Co. v. Ogden Levee District*, 15 F. (2d) 637, says:

> "This court has pointed out in Thomas vs. Kansas City Southern Ry. Co., *supra*, that there is no connection between general taxation and assessments for special benefits."

The fact that in this case the assessments were made by entirely different assessing authorities on different bases and for different purposes, conclusively, we submit, shows in and of itself discrimination, in view of the legislative adoption of such bases *for benefit assessments.*

It has been seen that individuals and other corporations are assessed by country assessing authorities, and the assessments as adopted for the basis of imposing the special taxes within the district show that only one individual, firm, or corporation other than appellant was assessed during the year in question upon intangible personal property, and that individual to the extent of only $150.00. It has likewise been seen that the assessment made against the railroad by the Tax Commission included therein not only a large, undisclosed amount for rolling stock, but likewise for the railroad's franchise or going concern value. The law under which the State Tax Commission is required to assess railroads contains the requirement that the assessment of such corporations must take into consideration "the value of the franchise, the capital stock engaged in the business in this State." (*Section 9368, Hemingway's Code of 1927, R. 152.*)

In the case of *In re Chicago, R. I. & P. Co.*, 28 F. (2d) 56, the court quotes, with approval, from *Railway Company v. Anderson County*, 120 Kan. 240, 243 Pac. 282, as follows:

"'The assessment of benefits against plaintiff's property appear to have been made, largely, *upon the basis of its valuation for the purpose of general taxation fixed by the state tax commission.* There was no independent investigation by the commissioners to ascertain a basis for proper valuation, no examination or inspection of the properties such an examination of rails and roadbed, listing of buildings, bridges, culverts, measurement of cuts or fills, etc., and no exercise of independent judgment by them upon the facts which were ascertained. The tax rolls of farm property as returned by the assessor and the report of the tax commission as applied to railroads, exclusive of rolling stock and material were adopted and used as a basis for assessment of benefits. *This was not a correct method.* The tax commission fixes its valuations of railway property by taking into consideration, not only the physical right of way and track, but *various other intangibles, including stocks and bonds* owned by the company, its connection with other roads, its earning capacity, *its value as a railway property, and other items reported to it.* The value is placed upon the property as a whole and apportioned on a mileage basis through the taxing districts which it traverses. It will readily be seen that the commissioners in the instant case were in error in merely adopting the value fixed by the tax commission with its rolling stock and materials excluded'." (Italics ours.)

In re Chicago, R. I. & P. Ry. Co., supra.

Appellant earnestly insists that the adoption by the legislature of the general assessed values, of personalty as well as realty, as the basis for apportioning special and local road improvement assessments on arbitrarily carved out, superimposed and overlapping

districts is in and of itself so arbitrary and discriminatory as to want due process of law and to deny the equal protection of the laws, to one whose property rights are affected.

Is the Assessment Itself Invalid?

The ultimate question in this record is whether the facts shown establish that the assessment levied upon the appellant violates its rights guaranteed by the Fourteenth Amendment.

Stating facts analogous to the facts in this record, this Court said:

> "The estimated cost of the improvement was about $75,000.00. For the purpose of defraying a part of this cost the directors levied, in the year 1918, a tax of $7,346.12, being 6 per cent of the assessed value of all real estate within the district. Of this amount it levied upon the railroads $4,194.60, being 6 per cent of the assessed value of their property. Upon the 12,000 acres of land, being all the other real estate in the district, the directors laid, in the aggregate, taxes of $3,151.52, being 6 per cent of its assessed value. Thus, 57 per cent of the burden was imposed upon the railroads and 43 per cent upon the owners of all the other real estate."

And, continuing, held:

> "The tax laid imposes upon the railroad, which can receive no direct or immediate benefit, a very heavy burden; and the lands which will receive a large direct (and possibly immediate) benefit are required to bear only a very small part of the burden. * * * The fact is that the tax levied is grossly discriminatory."
>
> *Thomas v. Kansas City Southern R. Co., supra.*

The facts in this record are:

1. The entire district comprises 2,950 acres, of which 57.79 acres belong to the appellant, or only 1.9 per cent, while of the total assessment of $181,448, $113,200 thereof is against the appellant, being 62.39 per cent. of the total assessment.

2. Considered as acreage, the assessment against appellant is on the basis of $1,958 per acre, while the other lands in the district are assessed on the basis of $23 an acre, the railroad's assessment being 83 times as great.

3. The territory to be comprised in the district was so arbitrarily selected by the petitioners as to include therein a part of Section 29; however, no part of the Oldham roads lie within this section, the boundaries thus being fixed including an extra eight-tenths mile of main track mileage of the appellant, which, at the basis assessed, increased the assessment against the appellant by $28,000 alone.

4. Farm lands in the district have been directly benefited by the Oldham road to the extent of a one-hundred-per-cent increase in value, but there is no evidence of any direct enhancement in value of appellant's property, the record showing, on the other hand, that the local freight and passenger business of appellant has decreased from 40 to 60 per cent due to automotive competition.

5. The two gravel companies, which are benefited more than any one else in the district, are each assessed only 8 per cent of the tax, while the railroad, which is not directly benefited, is alone assessed 62 per cent of the entire tax.

6. The railroad's assessment includes large amounts of intangible and franchise values, while the only

other intangible assessment in the district is against one individual who is assessed for $150.

For illustrative purposes we tabulate the facts found in the following cases and compare them with the facts shown in *this* record:

Special Assessments Held Arbitrary and Discriminatory under the Fourteenth Amendment.

In *Railway Company v. Mitchell Co.*, 110 Kan. 582, 204 P. 729, farm lands assessed at $4 per acre, railroad's right of way at $57 per acre, *or 15 times greater.*

In *Mo. Pac. Ry. Co. v. Road Improv. Dist.*, 288 F. 502, farm lands assessed at $2.40 per acre, railroad's right of way at $200 per acre, *or 80 times greater.*

In *Kansas City Sou. Ry. Co. v. May*, 2 F. (2d) 680, farm lands were assessed at $8 per acre, railroad's right of way at $930 per acre, *or 116 times greater.*

In *In re C. R. I. & P. Ry. Co.*, 28 F. (2d) 56, farm lands were assessed at $52 per acre, railroad's right of way at $2,100 per acre, *or 40 times greater.*

In *Kansas City Sou. Ry. Co. v. Ogden Levee Dist.*, 15 F. (2d) 637, farm lands were assessed about $7 per acre, railroad's right of way about $2,000 per acre, or *285 times as great.*

IN THE OLDHAM DISTRICT, FARM LANDS ASSESSED AT $23 PER ACRE, RAILROAD'S RIGHT OF WAY AT $1,958 PER ACRE, OR 83 TIMES GREATER.

In *Thomas v. K. C. S. R. Co.*, 261 U. S. 481, railroad owned .3% of acreage *and was assessed 57% of the tax.*

In *In re C. R. I. & P. Ry. Co.*, 28 F. (2d) 56, railroad owned .8% of acreage *and was assessed 14% of the tax.*

In *Kansas City Sou. Ry. Co. v. May*, 2 F. (2d) 680,

railroad owned .3% of acreage *and was assessed 31% of the tax.*

In *Kansas City Sou. Ry. Co. v. Ogden Levee Dist.*, 15 F. (2d) 637, railroad owned .8% of acreage *and was assessed 59% of the tax.*

In *Road Improv. Dist. No. 1 v. Mo. Pac. R. Co.*, 274 U. S. 188, railroad owned .8% per cent of acreage *and was assessed 13.2% of the tax.*

IN THE OLDHAM DISTRICT, RAILROAD OWNS 1.9% OF ACREAGE AND IS ASSESSED 62.59% OF THE TAX.

In *In re Chicago R. I. & P. Ry. Co., supra,* the Court said:

> "The record here discloses that to the 25 acres of railroad right of way, approximately 1/120 of the total acreage of the district, has been apportioned *one-seventh* of the cost; that the benefit to the railroad property was slight in proportion to the benefit to adjoining land, and that the proportion assessed the company far exceeded any possible benefits derivable by it from the project. Such assessment cannot stand." (Italics ours.)

And referring to this Court's leading case on the subject, *Road Improvement District No. 1 v. Missouri Pacific R. Co.* (274 U. S. 188), it is found that therein the railroad successfully contested *the legislative assessment* against it of special taxes growing out of the inclusion of its property in a road district created by the legislature of Arkansas. The Road District was 24 miles long, and 5 or 6 miles wide, through which the railroad ran. In area it comprised 67,000 acres, while the right of way of the railroad therein was 565 acres, or 8/10 of 1 per cent. The entire benefits assessed aggregated $585,000, of which $75,000, or 13 per cent. was assessed against the railroad.

The opinion says:

> "From all the testimony we think there is ample ground for believing that the improved road will lead to an increase in the traffic and revenue of the railroad, as respects freight moving in carload lots and passengers traveling considerable distances, but that the benefit from this will be cut down by a substantial loss in local freight and passenger traffic attracted to motor-driven vehicles moving over the improved road. That such a loss in local traffic usually ensues when hard-surface roads adapted to use by motor-driven vehicles are constructed practically parallel to railroads is not only shown by the testimony, but is common knowledge. It received distinct recognition in the President's message of December 8, 1922, to Congress.
>
> "We think it also appears from the testimony that the increase in revenue reasonably to be expected will be greater than the loss, but that the excess will not be such as to justify an assessment of benefits of $75,686, or more than a small fraction of that sum. Indeed, on the present showing, we should regard an assessment in excess of $15,000 as passing the outside limit of reasonable judgment and plainly arbitrary.
>
> "Our conclusion is that the assessment against the railroad is unreasonably discriminatory in so far as it is based on personal property, and in this respect violates the equal protection clause of the Fourteenth Amendment, and that it is otherwise so excessive as to be a manifestly arbitrary exaction and in violation of the due process of law clause of the same amendment. In these respects the finding and holding below are well grounded."

We therefore submit that these facts and authorities conclusively establish that the special assess-

ment herein violates appellant's constitutional rights under the Fourteenth Amendment.

CONCLUSION.

Appellant is not seeking to evade its fair share of the tax burden. It conceives it to be its right to resist an exaction so plainly arbitrary and discriminatory as this is, and to this end it respectfully submits that the judgment of the court below should be reversed.

Respectfully submitted,

S. R. Prince,
John B. Hyde,
Attorneys for Appellant.

L. E. Jeffries,
Ely B. Mitchell,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 8.

MEMPHIS & CHARLESTON RAILWAY COMPANY, *Appellant*,

v.

C. L. PACE, G. C. STEPHENS, R. C. GRISHAM, ET AL.,
Appellees.

Reply Brief to Brief of the Attorney General of the State of Mississippi as Amicus Curiae.

S. R. PRINCE,
JOHN B. HYDE,
Attorneys for Appellant.

L. E. JEFFRIES,
ELY B. MITCHELL,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Reply Brief to Brief of the Attorney General of the State of Mississippi as Amicus Curiae.

May It Please the Court:

Appellant, leave of the Court having been obtained, herewith presents the following reply to the brief of the Attorney General of the State of Mississippi, as *amicus curiae.*

INTRODUCTORY.

The brief of the Attorney General of Mississippi as *amicus curiae* is based on a misconception of the scope

of this litigation. It is based on the assumption that all the special road improvement bond issues in the state are in jeopardy of being declared invalid by this Court.

That this is a misconception needs but a moment's consideration of two points:

(1) The special road improvement bond issues of the state have all been saved by the decision of the majority of the Supreme Court of Mississippi in this case on rehearing (154 Miss. 536) where that court held (a) that since the Board of Supervisors might deny the petition to establish the road district, a property owner was not entitled to notice and hearing within this Court's rule as set out in Browning v. Hooper, 269 U. S. 396, and (b) that the special validating act, Chapter 1080, Laws of 1926, was valid under the Constitution of Mississippi.

This decision of the state's highest court is binding on this Court; it established the validity of the technical *creation* of the Oldham Road District and all other road districts organized under the machinery of Chapter 277, Laws of 1920; and foreclosed the carrying forward by the appellant in the appeal to this Court all those questions which were finally decided by the court which had final jurisdiction of such questions.

(2) The second reason why all the special road improvement district bonds of the State of Mississippi are not in jeopardy of being declared invalid in this litigation is the primary principle that this Court has no power per se to declare acts of state legislatures invalid upon the ground that they conflict with constitutional provisions, and that only one whose constitutional rights have been directly impaired by

state laws, or impositions based upon state laws, is entitled to attack the validity of such laws or impositions in the Federal courts.

This Court has recently said:

> "The federal courts have no power *per se* to review and annul acts of state legislatures upon the ground that they conflict with the federal or state constitutions. 'That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.'"
>
> *Williams v. Riley,* 280 U. S. 78.

An illustration of the principle just stated is contained in the litigation in Texas subsequent to the decision of this Court in *Browning v. Hooper, supra.* In the case of *Dunn v. Fort Bend County,* 17 Fed. (2d) 329, the bondholders therein conceived that the decision in *Browning v. Hooper* had the effect of declaring similar road bond issues of Texas unconstitutional, but the special court of three judges, convened under Section 266 of the Judicial Code therein, held otherwise, stating:

> "* * * the protection furnished by the due process clause of the Fourteenth Amendment is a purely personal right or privilege, and a condemnation of a statute in a particular case as repugnant to that Amendment as to the plaintiff in it does not, and cannot, affect or impair the statute itself as a valid and existing law * * * except as to the particular person complaining, and as to the particular thing he complains of * * *".

In *Massachusetts v. Mellon,* 262 U. S. 447, this Court said (*loc. cit.* 488):

> "The party who invokes the power (*i. e.*, the power of declaring that an exactment is unconstitutional as applied to the litigant) must be able to show not only that the statute is invalid but *that he has sustained or is immediately in danger of sustaining some direct injury* as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." (Italics added.)

Thus, as has been stated above, to sustain appellant's constitutional rights in this case will not have the effect of invalidating other special bond issues in the State of Mississippi except as to some litigant who may bring himself, on the facts of his case, within whatever principle this Court may apply; but nevertheless, *if it should affect others*, that in itself cannot deter this Court from exercising its right, power, and jurisdiction to protect the constitutional rights of this litigant who is invoking its protection.

Appellant's rights may not be sacrificed to cure a possible invalidity in other bond issues, if such there be.

REPLY BRIEF.

The brief of the *amicus curiae* makes four contentions:

I.

THE ALLEGED NEW POSITION OF APPELLANT IN THIS COURT.

The Attorney General contends that appellant has abandoned its position assumed in the Mississippi courts and attempts to present a new case in this

Court in that it does not renew the assignments of error made in the Supreme Court of Mississippi dealing with the alleged invalidity in the creation of the district.

Appellant's answer to this contention is that it and this Court are bound by the decision of the State's highest court relating to the state Constitution and state statutes and that it is no longer possible here for appellant to contend that the district was invalidly organized or that the special validating act approved as constitutional under the Constitution of Mississippi did not serve to place the Oldham Road District in the class of legislatively created districts.

Appellant's case in the courts below was of double aspect, (1) that the district was invalidly organized both under the laws and Constitution of Mississippi, and for want of notice and hearing in violation of the Fourteenth Amendment, and (2) that *the assessment was violative of appellant's rights under the Fourteenth Amendment.*

As to the first, the decision below is binding; as to the second, this Court only is the final arbiter.

Necessarily, therefore, the appellant here no longer makes the first contention, but it continues to contend here, just as it contended in the amendment to its original bill, that:

> "The assessment made against its land in said road district is plainly arbitrary and unreasonable and discriminatory; the assessment was excessive in itself, or when compared with the assessment against other property. It is a violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States."
>
> (*Bill*, R. 17-18.)

It litigated this point in the trial court, and the Chancellor therein having held against the appellant (*Opinion of the Trial Court,* R. 197), appellant renewed the same contention in its assignments of error in the Supreme Court of Mississippi.

> *Assignments of Error,* XII and XIV, R. 208, 209.

The majority of the Supreme Court of Mississippi in the final opinion of that court on rehearing in this case expressly held against this contention of the appellant where it said:

> "We are unable to see that the operation of the statute has worked any arbitrary and unreasonable discrimination against appellant."
> *Memphis & Charleston v. Bullen,* 154 Miss. 536 (R. 240)

There has therefore been a consistent claim by this appellant throughout this litigation of the grounds set up in the Assignments of Error in this Court, and no different case is made here than was litigated below.

The brief of the *amicus curiae* also makes the point that it was not specifically stated in the original bill that the deliberate inclusion in the district of appellant's right of way through Section 29 had the effect of increasing the assessable mileage of the appellant in the Oldham District by 35 per cent. (Brief of *Amicus Curiae,* p. 5-7.)

Appellant concedes that this *evidential fact,* which appellant insists *is* plain evidence of arbitrary action, was not in express terms stated in the face of the original bill.

However, in no system of jurisprudence is there any principle which precludes a litigant, under an allegation well pleaded of arbitrary and discriminatory exaction, from showing *evidential facts which tend to prove the abuse and the discrimination alleged.*

It has been seen above that throughout the progress of this litigation the appellant herein was contending that the assessment as applied to its property was arbitrary and discriminatory. It had the right to, and did, on this issue, its allegation having been expressly denied in the answer, show *all facts* which went to prove this contention.

Among the facts so proved, *and which fact was not and could not be controverted,* was the fact that in the original petition praying for the creation of the district, the boundaries thereof, as then and forever after finally fixed, expressly included an additional eight tenths of a mile of appellant's main track through Section 29 which had the effect of increasing the taxable mileage of appellant in the district by 35 per cent. (R. 71 and 82.)

The statement in the brief of the Attorney General to the effect that the appellant did not argue this question as to the arbitrary inclusion of more of appellant's property in the district than was justified, in the courts below, is incorrect.

Appellant nowhere in this case has made a suggestion that any fraud has been committed against it by the State of Mississippi or any of its political subdivisions. It does insist that it had a right below to present, and has a right in this Court to argue all facts in the record bearing on the question of whether or not the assessment involved in this case

is so arbitrary and so discriminatory as to offend the Fourteenth Amendment to the Constitution of the United States.

Appellant so contended in its pleadings and from the inception of this case; in the trial court below; throughout the arguments there; throughout two arguments in the Supreme Court of Mississippi; throughout its former argument in this Court; *and it still contends the same thing now.*

II.

ALLEGED ESTOPPEL AND LACHES.

The Attorney General in his brief contends that appellant is estopped from contesting this case, by a delay of a year in filing its bill after the Oldham Road District was organized, although it is admitted that the district was organized without any notice of any kind to appellant.

(It is stated in the Brief, page 16, inadvertently, no doubt, that the delay of the appellant was for a year after the "tax was levied". This statement is erroneous, as will be seen hereafter.)

Appellant submits that there is in this record no basis for a charge of estoppel or laches against it. The facts are:

(a) That the petition of 20 per cent of 26 voters for the creation of the district was filed, *without notice to appellant,* on January 4, 1926. (R. 38.)

(b) That 22 voters, 19 for and 3 against, voted for the creation of the district on January 30, 1926 (R. 41, 46). *Appellant had no vote.*

(c) *That the bonds of the district were sold to the Iuka Guaranty Bank on February 4, 1926.* (R. 54-55.)

(d) The appellant, *still without notice of the creation of the district,* for if it had known thereof it would have had to show the fact, filed its return for 1926 taxes with the State Tax Commission as required by law, on or about April 1, 1926 (R. 122.)

(e) The State Tax Commission, *having just heard of the creation of certain new road districts,* sent the following letter to appellant *on June 2, 1926*:

"Dear Sir:

"We are enclosing herewith, description of certain road and School Districts; some of these are new districts; some of them are districts created one or more years ago; *but just reported to this office.*

"Please acknowledge receipt of these descriptions, and if you own no property in the District, please advise us and return the descriptions, and if you do have property in the District, please let us know about when you can furnish us an assessment covering same.

"With best wishes, I am,

"Yours very sincerely,

(Signed) A. S. Coody, Sec."

"Description of the territory embraced in the Oldham Road District, in Tishomingo County, Mississippi, created Feb. 1st, 1926." (Italics added.)

(R. 128-129.)

This was the first notice of the creation of the district which the appellant received (even the State Tax Commission states it had just learned of the "new district") and it was *four months after the*

bonds of the district had been sold to the Iuka Bank and three weeks after the purchaser actually paid the money to the district, which appears to have been on May 10, 1926. (Ex. FF, R. 199.)

(f) Appellant furnished the State Tax Commission the mechanical separation of its property as to this new district *on June 23, 1926, asking that its former return "be corrected accordingly"* (R. 130).

(g) The State Tax Commission's final assessment of all of appellant's property in the state was not made until after a protest by appellant and a hearing had thereon subsequent to June 23, 1926 (R. 123 and Secs. 9386 and 9387, Hemingway's Code of 1927), and under the law the Commission does not deliver the railroads' assessment rolls to the counties until November 15, in each year.

Sec. 9398, Hemingway's Code of 1927.

(h) *The tax levy on which the assessment sought to be enjoined in this case is based was not made by the Board of Supervisors until November 5, 1926* (R. 199-201).

(i) *Within the time required by law, appellant paid its other taxes to the County and on January 7, 1927, notified the taxing authorities that it considered the Oldham istrict assessment invalid* (R. 133).

(k) It appears that *by private law, Chapter 1080, Laws of 1926,* the legislature validated the creation of the Oldham Road District, this private act being approved March 11, 1926. As to this, appellant submits that it was not even charged with notice in law, it being, as aforesaid, *a private law,*

which does not appear in the volume of General Laws of 1926, and the existence of which was actually unknown to appellant until the answer was filed in this cause on December 12, 1927 (R. 18).

The Supreme Court of Tennessee held that:

> " * * * the familiar maxim, that ignorance of the law is no excuse for the breach or non-performance of any agreement, because any one is presumed to know the law, applies only to general public laws, which prescribe a rule of action for the whole community; and that it has no application whatever to special or private laws, which are only intended to operate upon particular individuals. See 1 Sneed, 698-716.
>
> "A special or private law, in this respect, stands upon the same footing with the law of another government. And all the authorities concur, that ignorance of foreign law is deemed to be ignorance of fact; because no person is presumed to know the foreign law, and it must be proved as a fact."
>
> *King v. Doolittle, v Head* (Tenn.) 77 (*loc. cit.* 84-85).

Even assuming, however, that this private law was notice in law to appellant on March 11, 1926 (though it does not appear to have been known even to the State Tax Commission until June 2, 1926), let the above facts be examined to determine what, if anything, the appellant could have done, relative to the assessment against it, after that date and prior to the filing of the bill herein in May, 1927:

As a taxpayer, appellant (assuming that it knew on March 11, 1926, that an attempt had been made to validate the creation of the Oldham Road District,

but which had been created *and the bonds of which had been sold on February 4, 1926*), might have filed some sort of legal proceedings attempting to enjoin the county and the Oldham Road District from expending funds on roads within the district, but its only possible grounds for such attack would have been the grounds later set up in this proceeding relating to the invalidity of the creation of the district, *all of which grounds have been found to be not well founded by the Supreme Court of Mississippi.*

But it could not, on that date nor on any date prior to November 5, 1926, long after the Attorney General of Mississippi admits in his brief that the district funds had been expended, have filed any sort of proceedings asking the only relief which it prays for in this case; that is, attacking *the assessment against its property as a property owner in the Oldham Road District,* for the simple reason that the assessment against its property was not levied until after the latter date—that is, November 5, 1926 (R. 199-201).

In other words, the position of adversary counsel in this case seems to be that in order not to estop itself from an invalid assessment later to be made, a taxpayer must file a suit, not well founded, in order to attempt to seek an injunction against the taxing authorities from paying out money for which they may possibly later levy an invalid tax. Such a position is unheard of and is wholly untenable.

The most that appellant can be held charged with as notice in law, by reason of the passage of the special validating act, was notice that under the Mississippi Constitution the Oldham Road District had been validly created and that all questions as to the technical validity of the creation of the district were

foreclosed. If that is the law now, as it is under the decision in the court below, it was the law from March 11, 1926, when the act was passed and appellant could not have prevailed in any attack on these grounds.

But between March 11, 1926, and November 5, 1926, these being the respective dates of the approval of the validating act and the tax levy, appellant would have had no standing in any court to file a suit on the grounds now before this Court on appeal, viz.: that *the assessment* imposed on its property for the year 1926 by force of Chapter 277, Laws of 1920, is so arbitrary and discriminatory as that it offends the Fourteenth Amendment to the Constitution of the United States. Between those dates it would not have been heard to assert in any court that, though the district was validly organized, appellant yet fancied that an assessment against it in the district, to be made in the future on a basis not yet fixed by the State Tax Commission, *would probably* result in an unconstitutional assessment on its property.

The entire argument as to estoppel and laches is based on an erroneous assumption; viz., that the appellant, prior to the making of the assessment which is attacked in this cause, could have sought the relief as to that assessment now sought in this Court.

It is suggested in the brief of the *amicus curiae* that appellant, during this interim, could have impounded the proceeds from the sale of the bonds of the district. Prior to the date *of the assessment* against its property it could only have impounded these funds as a general taxpayer on the grounds that the district was, for some reason, invalidly organized, *not upon the ground that the creation of the dis-*

trict would later result in unconstitutional assessment against its property in the district. But as to this suggested suit, as has been stated, appellant would not have succeeded because the highest court in the State, *in this cause*, has held that the district *is validly organized* and hence appellant's attack thereon would have fallen to the ground.

When appellant did file its suit it included therein in good faith its many attacks on the validity of the original creation of the district and prayed, moreover, for the relief now insisted upon in this case; viz., relief from the unconstitutional imposition of the special assessment on its property. As to the first branch of its attack, it has been held by the state's highest court that the same was not well founded, and hence appellant cannot be held to be estopped or to have been guilty of laches by failing to take an utterly futile step. As to the other branch of its attack, it could not have contested the unconstitutional assessment before it was made.

As to appellant's right to invoke injunctive relief against an unconstitutional *assessment,* no question whatsoever is raised in the answer or in any contention of the appellees in the lower courts or in this Court, and in fact no such question was even suggested in any of the four separate opinions of the Supreme Court of Mississippi which appear in this record.

It must be borne in mind, moreover, that the assessment sought to be enjoined in this case is the *first annual assessment* with reference to the Oldham bonds, which assessment will recur, so far as appears, every year in the future, until the bonds are paid.

A much stronger case of alleged estoppel against

the property owner came before the Court of Appeals for the Eighth Circuit in *Kansas City Southern Railway Co. v. Ogden Levee District*, 15 F. (2d) 637. There the taxing authorities contended that, the Railway Company having paid taxes in the special levee district *for fourteen years prior to the attack*, it was estopped by such course of conduct from complaining against a particular year's assessment. But the court said:

> "Estoppel is claimed because of the fact that appellants have recognized the district and have paid the levee taxes for approximately 14 years, and during said time bonds have been issued by the district to cover the cost of the levee and improvements subsequently made. The trial court held that appellants could not question the rule of taxation fixed by the state statute, because they had paid these taxes for so many years. *It must be borne in mind that taxes are assessed each year, and each year's tax was based on that year's assessment*, which constituted a new transaction. Each year there was a new right to complain of the new assessment and the new tax. Bonds had been issued originally in the sum of $20,000, and later in the sum of $5,000, to cover the repairing of some breaks and some damage to the levee occurring in the years 1915 and 1916. Appellants had nothing to do with the issuance or with the sale of bonds. The purchasers of the bonds presumably knew that there would be a new assessment each year. *Appellants have paid unjust taxes assessed against them for some 14 years*, and the taxes paid amount to more than the face of the bonds. None of these bonds, however, appear to have been liquidated. There is ample property in the district to pay the bonds, even if the assessments of benefits are fairly and properly apportioned. By the payment of these

taxes during these years, certainly no right has arisen in favor of the bondholders to demand that appellants shall continue to pay a disproportionate share of the taxes. It is immaterial to the bondholders as to the proportion of such taxes which the railway company and the landowners shall bear. They have no interest in such question. Kansas City Southern Ry. Co. et al. v. May et al. (C. C. A.) 2 F. (2d) 680." (Italics added.)

The above case has again come before the Eighth Circuit and its decision therein has been reported since this case was argued before this Court on March 5, 1930. In the later decision the court again invalidates the assessments against the Railway Company *for later years* in the same special district.

> *Ogden Levee District v. Kansas City Southern Ry. Co.*, 39 Fed. (2d) 884. (Decided February 20, 1930.)

In the case of *O'Brien v. Wheelock*, 184 U. S. 450, this Court overturned an argument similar to that of appellees and the Attorney General in this case, to the effect that certain taxpayers were estopped by conduct from asserting an admitted constitutional invalidity in certain assessments, and it was said:

> "*But it is contended that while all this may be so as to the general public, yet that appellees, or some of them, have so conducted themselves that they are estopped from asserting such invalidity, and that the Circuit Court should have enforced the assessments exactly as if the law had been a constiutional enactment.* The bill sought to collect not only the assessments already made, but asked to have further assessments made to pay

the bonds in full, and to maintain and preserve the security; and the court was also asked to declare that the assessments created valid liens upon the lands, and to decree that the bonds sued on were a lien on the assessments and to enforce their collection. In other words, that the court execute the act, either as in itself wholly valid or valid as to these defendants. *We are unwilling to assent to the doctrine of legislation by estoppel. The courts cannot, by the execution of an unconstitutional law as a law, supply the want of power in the legislative department.*" (Italics added.)

The Supreme Court of Tennessee, citing *O'Brien v. Wheelock, supra,* and quoting from a decision of the Supreme Court of Illinois in *Holcomb v. Boynton,* 151 Ill. 300, stating that it would be a novel idea "in the law of estoppel that the doctrine should be applied to a person who has been guilty of no fraud, simply because, under a misapprehension of the law, he has treated as legal and valid an act void and open to the inspection of all", *held that there was no basis for a claim of estoppel by reason of the fact that a taxpayer had paid two or three of the annual assessments against his property* in a special district, and *later* asserted his constitutional rights to attack a subsequent assessment.

Obion County v. Coulter, 153 Tenn. 469.

To paraphrase the above statement of the Supreme Court of Illinois in *Holcomb v. Boynton, supra,* it would be a still more novel idea in the law of estoppel that the doctrine should be applied to a person simply because, under *no* misapprehension of the law, he has treated as legal and valid an act *afterwards found to be legal and valid.*

If it be true that even an express legislative act *validating an assessment* does not estop a taxpayer, as this Court has held in *Road Improvement District No. 1 v. Missouri Pacific R. Co.*, 274 U. S. 188:

> "but, as the legislature could not put aside or override constitutional limitations, the confirmation (by the legislature of an assessment) did not prevent inquiry into the alleged violation of such limitations",

it must be held that there is not the slightest basis in this case for a charge of estoppel, much less laches, against the appellant in this case, simply because it had to wait until the tax was assessed before it attacked it.

The appellant cannot be *estopped* by simply failing to file a futile suit, and it cannot be held guilty of *laches* in failing to bring suit as to an assessment made after November 5, 1926, when it notified the authorities on January 7, 1927, or within two months, that it would not pay the invalid item, and sought the only remedy prescribed in the state jurisprudence, early in the same year.

The taxing authorities have not been misled by any act or conduct *of the appellant*, to their injury. In expending the proceeds of the bonds they relied, as they had a right to do, not on the failure of a railroad company to enjoin them, but on a special act of the legislature, and their reliance thereon has not been misplaced for the highest court of their state has said they were right.

But the failure of the railroad to attempt to enjoin a valid law cannot estop *it* from now contesting an invalid assessment which was not made until after the money was spent.

III.

THE FAILURE OF APPELLANT TO ATTACK THE SPECIAL VALIDATING ACT IN THE BILL.

The Attorney General, in his brief, pages 16-17, makes the statement that the original bill in this case did not attack the constitutionality of the special validating act, Chapter 1080, Laws of 1926. This fact is true, but it has no significance in respect to the issues before this Court.

As has just been seen above, the existence of the special validating act, not printed in the published volume of General Laws of 1926, was first brought to the attention of appellant when the Answer was filed on May 13, 1927. And certainly if appellant did not know of this special act at the time it filed its original bill in this cause, it could not have set up any asserted constitutional invalidity in such special act.

Assuming for the sake of argument, however, that appellant was charged with notice in law of the special act, it was not incumbent on it, nor is it now incumbent, expressly to attack by name in its pleading the constitutional validity of an act passed after the district involved in the litigation was created and the bonds sold, which act merely ratified and confirmed *the basis of assessment* prescribed in Chapter 277, Laws of 1920, which latter act *was* expressly attacked as unconstitutional in the bill. As a matter of fact, it is not incumbent on a party litigant, such as appellant, to assert the invalidity *per se*, and in and of itself, of a merely supplemental and cumulative legislative act in express words in its pleading,

provided the scope of the pleading makes it plain that its attack upon a special imposition is based on the alleged repugnance of the basic legislation to the Constitution of the United States. This is particularly true where, at the first opportunity, the litigant assigns error with reference thereto.

Although appellant submits that, owing to its lack of knowledge of the special validating act, it failed to mention that act by name in its original pleading, nevertheless the record shows that the question of *whether or not the special act was valid was litigated throughout the trial in the Chancery Court below* and that the Chancellor held, contrary to the contention of the appellant, that the special act served to validate the creation of the district.

(*Opinion of the Chancellor,* R. 197.)

To such holding appellant assigned error in the Supreme Court of Mississippi (*Assignments of Error, XIII,* R. 209), and a cursory examination of the opinions of the latter court shows that a large part of the litigation therein raged about the question of whether or not the special act was violative of constitutional rights. The Chief Justice of the Supreme Court of Mississippi holding, in his dissenting opinion (R. 245-246) that the special validating act, as well as the general validating act, was beyond the power of the Legislature.

Carrying the contention further, the appellant, in its Assignments of Error *in this Court,* renews its contention consistently made throughout the progress of this litigation, that both Chapter 277, Laws of 1920, and the two validating acts, both general and special, and all proceedings pursuant thereto which

resulted in the unconstitutional imposition on appellant's property, are invalid as repugnant both to the due process and the equal protection clauses of the Fourteenth Amendment.

In this connection it is not amiss to say again that this Court has held that even *an express legislative validation of a special assessment cannot override constitutional rights.*

> *Road Improvement District No. 1 v. Missouri Pacific R. Co., supra.*

This being true, it is impossible to see the significance of the fact that the appellant failed to attack by name in its original bill the validity of a special law of which it had no actual notice until after it had filed its said bill.

Appellant's contention regarding the law of this case is that the original act, Chapter 277, Laws of 1920, and the validating acts, both general and special, pursuant to which the assessment attacked was made, are in and of themselves violative of the appellant's rights in that they purport to approve the imposition of special assessments for special improvements on an *ad valorem* basis; and, finally, that the assessment itself, imposed under these acts, is so arbitrary and discriminatory that it cannot comport with the standard prescribed by the Fourteenth Amendment.

IV.

THE MISSISSIPPI SPECIAL ROAD IMPROVEMENT DISTRICTS ARE NOT INVALID UNDER THE DOCTRINE OF BROWNING V. HOOPER.

The Attorney General, in his brief, pages 17-20, makes the point that road districts organized under Chapter 277, Laws of Mississippi of 1920, are not similar from a standpoint of constitutional law to those road districts organized under the Texas statute which was involved in the decision of this Court in *Browning v. Hooper, supra.*

This point is readily conceded by the appellant for the reason that the Supreme Court of Mississippi in the decision below (*Memphis & Charleston Railway Co. v. Bullen, supra*) expressly held that the Board of Supervisors of a Mississippi county was vested with authority to *deny* the petition to create the district. Districts thus created, within the discretion of the Board of Supervisors, are, therefore, under this decision, equivalent to legislatively created districts, and hence a taxpayer whose property is included therein *is not entitled to notice and hearing* within the doctrine aforesaid of *Browning v. Hooper.*

The concession of this point, however, *does not affect any issue involved in this case in this Court* for the reason that the appellant herein no longer contends, and is not contending, that the district was invalidly organized for want of notice and hearing.

Its contention here is, as has been stated previously, that special assessments for special improvements cannot be imposed upon its property upon any basis where there is no reasonable presumption that

substantial justice will be done "but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred".

Gast Realty & Invest. Co. v. Schneider Granite Co., 240 U. S. 55.

And that it is a palpable abuse and an unreasonable discrimination to assess its property for special improvements 62.39 per cent of the total assessment when it owns but 1.9 per cent of the acreage.

Even if the assessment itself in dollars and cents had been expressly imposed upon the appellant's property by legislative act, instead of by the machinery under which the assessment was actually imposed, appellant would still be here making the same contention that it is now making; namely, that the assessment is arbitrary and that the assessment is discriminatory under the two clauses of the Fourteenth Amendment.

No such question was involved in the decision of this Court in *Browning v. Hooper.* But it *was* involved in the many prior decisions of this Court cited in appellant's original Brief, and in particular the precise question was involved in *Road Improv. Dist. No. 1 v. Missouri Pacific R. Co., supra,* and was there resolved adversely to the contention of the Attorney General and of the appellees in this case.

HOLDINGS OF THE COURTS SUBSEQUENT TO THE FIRST ARGUMENT IN THIS COURT.

Appellant takes this opportunity to call to this Court's attention a few cases which have accumulated and been reported since the original argument

in this Court on March 5, 1930, dealing with the issues involved herein.

Reference has heretofore been made to the second decision of the Eighth Circuit in the case of *Ogden Levee District v. Kansas City Southern Ry. Co.*, 39 F. (2d) 884, approving the previous decision as to an earlier year's taxes, as contained in *Kansas City Southern R. Co. v. Ogden Levee District*, 15 F. (2d) 637, which case was cited in numerous places in the appellant's original brief in this case.

In the later decision the court says:

> "We think the invalidity of the tax for the four years here involved is clear. The parties have introduced the evidence on the former trial and some additional evidence. This new evidence has not changed the essence, although it has varied the extent of the injustice of these assessments. As to the discrimination between the railway property and other property in the district, the showing is as follows:

Year	Railway lands	Other lands	Railway %
1923	2,443.50	1,675.99	59%
1924	2,357.75	1,346.20	62%
1925	2,357.75	2,580.80	47%
1926	2,298.22	2,580.90	46%
1927	1,609.24	3,526.06	31%

> "The entire railway property within the district was 24.4 acres, being the right of way and trackage—the trackage consisting of 1.81 miles of main track and about one-third of a mile of side track, while the other acreage taxed ranged from 2,716 to 2,569 in the five years shown on the above table. We cannot look at these figures and escape the conviction that to charge rail-

way property of that small amount and that character with that proportion of taxes for a work which primarily and principally benefits the other property in the district is palpably arbitrary and unreasonable and a taking of property without due process of law. It is confiscation under the cloak of taxation."

Ogden Levee District v. Kansas City Southern Ry. Co., 39 F. (2d) 884 (*loc. cit.* 886).

Again, in a decision handed down on December 9, 1929, which was not published in time for appellant to incorporate the same in its original brief, the Circuit Court of Appeals for the 10th Circuit, in *Straight Creek Drainage Dist. No. 2 v. Chicago, R. I. & P. Ry. Co.*, 36 F. (2d) 650, considered a special assessment against the railroad's property in the district under facts strikingly similar to the facts in the case at bar. The court says:

"It cannot be doubted that the drainage of Straight Creek will result in a direct, immediate and substantial benefit to the agricultural lands and in but slight benefit to the railway company's property. Under these circumstances, an assessment on a basis of either $2,100 or $1,200 per acre against the railway company's property and of $52 per acre against the agricultural lands, of 95% of the cost of the project, was palpably arbitrary and discriminatory, a plain abuse of the taxing power, and violative of the Fourteenth Amendment to the Constitution of the United States. Kansas City Sou. Ry. Co. v. May, *supra*; Missouri Pac. R. Co. v. Road Imp. Dist. (C. C. A. 8), 288 F. 502, 505; Thomas v. Kansas City Sou. Ry. Co., 261 U. S. 481, 484, 43 S. Ct. 440, 67 L. Ed. 758; Kansas City Sou. Ry. Co. v. Road Imp. Dist., 256 U. S. 658, 661, 41 S. Ct. 604, 65 L. Ed. 1151."

Finally, attention is directed to the latest action of this Court on the question of special assessments, embodied in its denial on Monday, October 13th, 1930, of the petitions for *certiorari* of the District of Columbia in the cases of *Dougherty v. American Security & Trust Co.*, reported in 40 F. (2d) 813, and *Dougherty v. Heurich*, 40 F. (2d) 815, (styled in this Court, *Luther H. Reichelderfer v. American Security & Trust Co.*, and *Luther H. Reichelderfer v. Heurich*, Nos. 245 and 246).

In the cases cited, the Court of Appeals of the District of Columbia had, following its decision in the case of *Johnson v. Rudolph*, 16 F. (2d) 525, declared unconstitutional, as palpably arbitrary and unreasonably discriminatory, street paving assessments on the front foot basis against real property in the District of Columbia, these assessments having been made under the provisions of the Act of Congress, 38 Stat. 517, 524, and a subsequent act, 39 Stat. 676, 716, known as the Borland Amendment.

The basis for the Court of Appeals thus declaring assessments made pursuant to the Act of Congress to be unconstitutional was that to apply the front foot basis for paving assessments in blind obedience to the statute, without reference to the peculiar status of the property assessed, constituted practical confiscation of such property. By the denial of the petitions for *certiorari* this Court has refused to overturn these decisions of the Court of Appeals, which decisions cite and rely upon the long line of decisions decided by this Court and cited by the appellant in its original brief herein (*Original Brief of the Appellant*, pages 28-29).

CONCLUSION.

Appellant desires to call attention to a recent expression by the Supreme Court of Tennessee embodying the general principle which governs the scrutiny of the courts with relation to special assessments. It was said:

> "*The power to assess all or a portion of the cost of a local improvement against a property deemed to be specially benefited thereby is one which is subject to great abuse* * * *". (Italics added.)
>
> *City of Nashville v. Roberts*, —— Tenn. ——, 27 S. W. (2d) 1086 (May 24, 1930).

It is respectfully submitted that the assessment attacked in this cause, as imposed on appellant's property, is unconstitutional, and that this Court should reverse the judgment of the court below.

Respectfully submitted:

S. R. Prince,
John B. Hyde,
Attorneys for Appellant.

L. E. Jeffries,
Ely B. Mitchell,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. ~~226~~. 8

MEMPHIS & CHARLESTON RAILWAY COMPANY, Appellant,

v.

C. L. PACE, G. C. STEPHENS, R. C. GRISHAM et al.,
Appellees.

Appeal from the Supreme Court of the State of Mississippi.

BRIEF FOR APPELLEES.

JAMES A. CUNNINGHAM,
Booneville, Mississippi,

MAGRUDER, WALKER & MAGRUDER,
W. W. MAGRUDER,
Starkville, Mississippi,
Attorneys for Appellees.

BENJAMIN H. CHARLES,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CE ntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 276.

MEMPHIS & CHARLESTON RAILWAY COMPANY, Appellant,

v.

C. L. PACE, G. C. STEPHENS, R. C. GRISHAM et al.,
Appellees.

Appeal from the Supreme Court of the State of Mississippi.

BRIEF FOR APPELLEES.

MAY IT PLEASE THE COURT:

SUPPLEMENTAL STATEMENT.

I.

The Memphis & Charleston Railway Company, on this appeal, attacks the validity of certain assessments against it in the Oldham Road District of Tishomingo County, State of Mississippi, under the due-process clause and the equal-protection clause of the Fourteenth Amendment to the Constitution of the United States. Such attack, for

all substantial intents and purposes, involves two issues and two issues only:

First. Whether or not Chapter 277, Laws of Mississippi of 1920, is in violation of such clauses of the Fourteenth Amendment, or either of same, as construed by the Supreme Court of the State of Mississippi.

Second. Whether or not the size, character and organization of the Oldham Road District is so palpably arbitrary, discriminatory and confiscatory as to deprive appellant of its property without due process of law.

Appellant, the Memphis & Charleston Railway Company, is a subsidiary corporation of the Southern Railway System, extending from the Alabama line through the State of Mississippi, and constitutes a link or segment in the main line of the Southern Railway System from New York City to Memphis, Tennessee.

Appellees are the Sheriff of Tishomingo County, State of Mississippi and the Board of Supervisors of said county and state.

For all practical purposes, we may say that the Memphis & Charleston Railway Company was complainant in the original cause and is now appellant in this tribunal, and that said Oldham Road District was defendant in the lower court and is now appellee here.

Incidentally, and in so far as may be necessary for the Court's consideration, this cause also involves the validity under the Fourteenth Amendment to the United States Constitution of certain Validation Acts adopted by the

Legislature of the State of Mississippi, at its regular session in the year 1926, as follows, to wit:

a. Chapter 278, Laws of Mississippi of 1926. b. Chapter 1080, Laws of Mississippi of 1926.

Such statutes are printed in full in the official transcript, Rec., pp. 188 and 193, respectively.

Complainant's attack on the various statutes of the State of Mississippi as violative of its constitution has been settled and precluded by the decision of the Supreme Court of said state.

The aforesaid Validation Acts were adopted by the Legislature of the State of Mississippi immediately after the decision of this tribunal, in Browning v. Hooper, 269 U. S. 396, 70 L. Ed. 330, commonly known as the "Texas Road Case" or "Archer County Case."

II.

OPINION OF THE COURT BELOW.

This case is reported as Memphis & Charleston Railway Company v. Bullen, 154 Miss. 536, 121 So. 826.

The original opinion of Division B, Supreme Court of Mississippi, was rendered through Justice Anderson on December 22, 1928 (Rec., pp. 211-15).

The final opinion by the Court, en banc, in response to suggestions of error submitted both by appellant and by appellees, and reconsideration accordingly, was rendered on April 15, 1929, also through Justice Anderson (Rec., pp. 231-247).

III.

The Supreme Court of the United States, under Section 237a of the Judicial Code of the United States, as amended by the Act of February 13, 1925 (43 Stat. 937), 28 U. S. C. 344a (as in effect prior to the Act of January 31, 1928, 28 U. S. C. 861a, 861b, Chapter 14, 45 Stat. 54, or the Amendatory Act of April 26, 1928, 28 U. S. C. 861b, Chapter 440, 45 Stat. 466), and pursuant to the provisions of the said last two mentioned acts of the year 1928, took cognizance or probable jurisdiction of the cause in due course, and it is now subject to such consideration at this time

IV.

HISTORY OF CAUSE.

The Oldham Road District of Tishomingo County, State of Mississippi, was organized under Chapter 277, Laws of Mississippi of 1920, by the Board of Supervisors of said county on the 4th day of February, 1926, with a bond issue of six thousand five hundred dollars ($6,500.00), for the construction of roads in such district.

The petition under the aforesaid statute for such district was filed with the Clerk of the Board of Supervisors on the 4th day of January, 1926, and the organization of the district was completed as stated herein, after an election and after full compliance with all statutory requirements for such purpose.

On the 13th day of May, 1927, appellant filed a bill for injunction in the Chancery Court of said county and state, attacking the constitutionality of Chapter 277, Laws of Mississippi of 1920, under the Fourteenth Amendment to the Federal Constitution (Rec., pp. 3-18).

On such bill, a temporary writ of injunction was secured on fiat of Hon. Allen Cox, Chancellor, who is now United States Judge of the Northern District of the State of Mississippi (Rec., p. 17).

Certain amendments were made by complainant in that court to such original bill (Rec., p. 17).

Defendants in such court in due time filed an answer to said original bill and amendments thereto, but later substituted therefor an amended answer (Rec., pp. 18-35).

After certain motions and orders thereon, not material for consideration by this tribunal, the cause was then submitted to the equity court or Chancery Court on such pleadings and on the facts in evidence.

No depositions were taken, but the cause was tried on oral evidence and exhibits in open court (Rec., pp. 38-205).

Final decree was rendered by the Chancery Court against complainant on the 11th day of February, 1928, dissolving the temporary injunction and dismissing the original bill, including amendments thereto.

From such decree, appeal was taken by complainant below to the Supreme Court of the State of Mississippi on the usual assignments of error (Rec., pp. 206-209).

The result of such appeal appears in the Court's decision, en banc, as aforesaid.

BRIEF.

I.

The tax of which appellant complains is not violative of the protective clauses of the Constitution merely because the statute under which the district was organized fails to provide the taxpayer with an opportunity to be heard.

St. Louis & S. W. Ry. v. Nattin, 277 U. S. 157, 72 L. Ed. 830;
Valley Farms Co. v. Westchester County, 261 U. S. 155;
Hancock v. Muskogee, 250 U. S. 454.

II.

The assailed tax was general and ad valorem. Its legality therefore does not depend upon the receipt of any special benefit by the taxpayer.

St. L. & S. W. Ry. v. Nattin, 277 U. S. 157.

III.

The Oldham Road District was organized by the Board of Supervisors of Tishomingo County, Mississippi. That board is, subordinate to the State Legislature, the governing body of the county, empowered by the Legislature to create ad valorem taxing road districts, and, with the ap-

proval of a popular vote, construct roads and issue bonds therefor.

Constitution of Mississippi, Sec. 170;
Laws Miss. 1920, Chapter 277;
St. L. & S. W. Ry. Co. v. Nattin, 277 U. S. 157.

IV.

Any interested party may take an appeal from any order of the Board of Supervisors.

Hemingway's Miss. Code 1927, Secs. 60, 61.

If appellant had any just cause for complaint when this district was organized, early in 1926, it should have been asserted, by appeal or otherwise, before the bonds of the district were issued. The filing of the bill of complaint should not have been delayed until May 13, 1927.

V.

In establishing its system of roads through the subordinate agency of road districts the State of Mississippi was not restricted to the organization of benefit districts only. It had full authority, as a sovereign state, to organize general taxing ad valorem districts.

French v. Barber Asphalt Paving Co., 181 U. S. 324;

Houck v. Little River Drainage Dist., 239 U. S 254;
Mo. Pac. R. Co. v. Western Crawford Road Dist., 266 U. S. 187, 190;
St. L. & S. W. Ry. Co. v. Nattin, 277 U. S. 157.

VI.

All questions having to do with the original creation of the Oldham Road District of Tishomingo County are foreclosed by the judgment of the Supreme Court of Mississippi.

Appellant's Statement as to Jurisdiction on Appeal, p. 6;
Memphis & Charleston Ry. Co. v. Bullen, 154 Miss. 536, 121 So. 826.

(Rec., pp. 231-247.)

VII.

The tax is not "capricious, arbitrary and discriminatory" because it is laid on personal property as well as on real estate. The district is not a benefit assessment district, levying assessments on benefited lands only. It is a general taxing district of the state, levying ad valorem taxes on all forms of taxable property.

All property is benefited by good roads.

Branson v. Bush, 251 U. S. 182;
Kansas City Southern Ry. Co. v. Road Imp. Dist. No. 3, 266 U. S. 379;
Mo. Pac. R. Co. v. Western Crawford Road Dist., 266 U. S. 187.

VIII.

The facts set out in the record clearly indicate that the assailed tax is not palpably arbitrary, plainly abusive and manifestly discriminatory, so as to cause it to offend against the protective clauses of the Constitution.

See our brief and argument on the facts, infra.

IX.

Mississippi's system of roads has been developed, for the most part, under four acts similar in all their essential features.

Laws Miss. 1910, Chapter 149;
Laws Miss. 1912, Chapter 145;
Laws Miss. 1914, Chapter 176;
Laws Miss. 1920, Chapter 277.

The Act of 1914 was assailed as being unconstitutional, but was upheld in

Prather v. Googe, 108 Miss. 670, 67 So. 156.

See also

G. & S. I. Ry. Co. v. Duckworth, 280 Fed. 733, 286 Fed. 645.

For the courts now to hold that the Oldham Road District was organized under an invalid act would paralyze hundreds of road districts and strike down millions in their public securities now owned by investors all over the country.

V.

THE QUESTIONS PRESENTED ON THIS APPEAL ARE SETTLED,

we respectfully submit, by the decision in

St. L. & S. W. Ry. v. Nattin, 277 U. S. 157, 72 L. Ed. 830, and cases there cited.

a. Because the validity of the Mississippi statute is challenged upon the ground that it fails to provide the taxpayer with proper opportunity to be heard. But, in the language of this Court (p. 159), "a sufficient short answer is that, under the repeated decisions here, this is not essential."

Citing:

Valley Farms Co. v. Westchester County, 261 U. S. 155;
Hancock v. Muskogee, 250 U. S. 454.

b. "As the assailed tax was general and ad valorem, its legality does not depend upon the receipt of any special benefit by the taxpayer."

St. L. & S. W. Ry. v. Nattin, supra.

c. A county board of supervisors in Mississippi is, subordinate to the state Legislature, the governing body of the county, just as "in Louisiana the police jury, subordinate to the state Legislature, is the governing body of the parish, and statutes of the state empower these juries to create road districts from such portions of their parishes as they may determine and, with the approval of a popular vote, to construct roads and issue bonds to pay therefor." Likewise, the Mississippi statutes now under attack

(particularly chapter 277 of 1920) empowered boards of supervisors to create road districts from such portions of their counties as they might determine and, with the approval of a popular vote, to construct roads and issue bonds to pay therefor.

Appellant's brief continues its attack upon the road system of Mississippi, although it has admitted, in its "Statement as to Jurisdiction on Appeal," that the "judgment of the state's highest court foreclosed a review in this Court of all technical questions considered below having to do with the original creation of the special district * * *" (p. 6, Statement as to Jurisdiction). It lays great stress on certain facts (while ignoring others), and makes these facts the basis for the argument that the tax against itself is so excessive and discriminatory that it, **the tax**, violates the protection afforded by the due-process and equal-protection clauses of the Fourteenth Amendment to the Constitution. But, interwoven with this is the further argument that the act itself under which the district is organized is void. This, of course, does not necessarily follow. And, with all due deference to our adversaries, we must insist that this is a nonsequitur, and indicates that appellant is not so much interested in the relatively petty tax involved in this case, as in destroying the acts under which the whole Mississippi road system has been built up. But the highest court in Mississippi sustained the district as having been lawfully organized as a taxing district of the state, under a valid statute; and therefore we must insist that the only question before the Court is not whether the act under which the district was organized is a valid legislative enactment, but whether the tax levied against this appellant, and it only, is an unlawful tax as

being violative of the protective clauses of the Constitution.

This is not a benefit assessment district, levying assessments on benefited lands only. It is a general taxing district of the state, levying ad valorem taxes on all forms of taxable property.

All property is benefited by good roads.

It does not necessarily follow that, because personal property in a lawfully-created road district is one of the subjects of taxation for roads, the tax is for that reason "capricious, arbitrary and discriminatory."

Appellant bases its appeal upon two assignments of error which, we respectfully submit, contain certain misconceptions. For example: That the State of Mississippi may not tax appellant railroad ad valorem, but only in proportion to "the specific benefits" to its property. In other words, that the state must be restricted to the organization of benefit districts only, and must not organize general taxing (ad valorem) districts. Secondly, that the state may not tax appellant's personal property in this district because (it is asserted) personal property is not benefited by roads.

We respectfully submit that both these bases for the first assignment of error are without foundation in law. The state may organize taxing districts of either or both types, and good roads bring benefits to personal property as well as to real estate. We therefore respectfully submit that the Mississippi road statutes (chapter 277 of 1920 and chapters 278 and 1080 of 1926), as applied to appellant, are not void for either of the above reasons, nor was the Supreme Court of that state in error in so holding.

BRIEF ON THE FACTS.

Maps of Tishomingo County, Mississippi, and of the Oldham Road District, including certain additional territory contiguous thereto, appear in the official transcript (Rec., pp. 204-205).

The Oldham road and the Gravel Siding road appear on the second map in red.

Such roads run, speaking in general terms, from what is called the Free Bridge road on the north to Gravel Siding at appellant's track or right of way on the south, and to the Village of Oldham also on the south or southeast, respectively, such latter road crossing the railroad track at right angles.

This system of roads in such district runs from the Free Bridge road south in one link, for approximately one-half of a mile, then dividing or branching out in two forks as aforesaid. Such roads are not parallel with appellant's right of way, but are more or less right-angle roads throughout the entire system to said right of way.

Complainant's bill in the Chancery Court of Tishomingo County, State of Mississippi, while attacking such district as unreasonable and arbitrary, does not undertake to designate any contiguous territory which should have been included.

Upon the contrary, C. N. Freeman, tax agent of the Southern Railway System, including the Memphis & Charleston Railway Company, testifying as a witness on

behalf of complainant, was unable to indicate any territory to the exclusion of which objection was made (Rec., p. 125).

> "Q. Do you know, or can you designate to the Court, any territory that was excluded in the organization of the Oldham Road District which ought, in your opinion, to have been included?
>
> A. No, sir; I cannot."

This same witness, Freeman, under cross-examination was unable to state any assets, personal property, or franchises in said district, subject to assessment that escaped taxation (Rec., pp. 124-126).

He was complainant's chief witness on the question or supposed question of discriminatory taxation against complainant, but the extent of his knowledge of conditions and values in the Oldham Road District was acquired by passing through said district in the berth of a Pullman car, "something like three o'clock in the morning" (Rec., p. 124).

In acreage, this is a small district, only about 2,950 acres, but it is a district of vast magnitude and importance to appellant because of the fact that it contains within its limits the two great gravel pits of North Mississippi, from which "Tishomingo Gravel" is shipped over the country for the construction of roads and other purposes, under the testimony perhaps one of the most important segments or divisions of the entire Southern Rail-

way System in its business and revenue producing power.

The Oldham Road District under the statutes of the State of Mississippi was not a Betterment District or Special Improvement District, but was an Ad Valorem District under Chapter 277, Laws of Mississippi of 1920, and under the decision of the Supreme Court of said state in the instant case (Rec., pp. 239-240).

The chief assault in the courts of Mississippi on the organization of this district is based on the contention that the Board of Supervisors of Tishomingo County had, as in the "Texas Road Case," no discretion to deny to petitioners the organization of such district; but the Court's opinion settles such contention against appellant, both in that court and in this court (Rec., pp. 236-238).

Complainant in its original bill also made attack on this district, claiming in effect that it was too **small**; but, in this tribunal, by its brief it substantially claims that the district is too **large** because of the fact that certain parts of section 29, township 3, range 11 east, of Tishomingo County, were not properly included in said district by virtue of the fact that no road was constructed in or through such section.

However, appellant, through its chief witness, Freeman, in the trial court specifically stated that he could not designate any territory to the exclusion of which objection was made (Rec., p. 125).

Furthermore, any such contention carries with it the demand, for the validity of every road district and all road bonds, that a road must be constructed in or through

every section of land in such district—an impossible proposition.

This situation admirably illustrates appellant's inconsistency.

The inclusion of the railroad's right of way and tracks from the eastern boundary line to the western boundary line of the Oldham Road District was not an arbitrary selection of such property for the purposes of taxation, but was merely in effect an extension of the road district from its limits on the north to the Lee highway on the south, extending from Washington, D. C., to Houston, Texas.

The manifest theory of appellant is that the organization of the district should have been extended from its northern limits to a line immediately north of the railroad right of way, thereby giving to appellant the vast benefit and advantage of the great gravel pits of this district without any liability whatever for the maintenance of its road system, absolutely essential, under the testimony, to the labor organization upon which the continued productivity of such pits must necessarily depend.

It is true, under the decision of the Supreme Court of Mississippi, in the instant case, and also in other cases, that the Board of Supervisors of various counties of such state are without power to modify the proposed boundaries of a road district as selected by the petitioners therefor; but the right of the Board of Supervisors to deny the petition for the organization of any such district

affords protection against the arbitrary procedure available to petitioners under the statutes of other states, noticeably the State of Texas, prior to its present statutes.

Appellant, in its brief, urges, in effect, the invalidity of Chapter 277, Laws of Mississippi of 1920, stating that after a favorable vote in the election for the organization of road districts "* * * the Board of Supervisors, who constitute the governing body of the county, shall organize the special district, **comprising only the boundaries especially named in the original petition** and issue the bonds thereof; the proceeds of which are to be used **only for the construction and maintenance of specially designated roads in the district.**"

We, therefore, ask, "specially designated" by whom?

The Mississippi statute answers this inquiry conclusively against appellant in the very citation employed by appellant in its brief.

In the first place, the statute cited by appellant does not, anywhere, refer to any road or roads as **special roads** or **specially designated roads**, but merely says:

> "That the Board of Supervisors of any county in this state are hereby authorized and empowered to construct or construct and maintain, or maintain one or more highways for the convenience of the traveling public * * *."

Petitioners have no right or power whatever to select or designate such highways, for that is a discretionary

power in the Board of Supervisors, over which petitioners have no control.

It, therefore, follows that the statutory system of the State of Mississippi for its road districts does not contemplate **specially designated roads**, as appellant's brief appears to indicate, subject to selection by petitioners, but merely **one or more highways**, in the discretion of the Board of Supervisors and subject to their exclusive authority under Section 170, Constitution of the State of Mississippi of 1890.

In connection with the facts of the instant case, we note the observations of the Court in Wight v. Police Jury of the Parish of Avoyelles, Louisiana, et al., 264 Fed. 705, which was decided by the C. C. A. (Fifth Circuit), on the 18th day of June, A. D. 1919. The Court there discussed in considerable detail the modern conditions resulting from new methods of communication, transportation and commerce, as distinguishing elements of civilization, and for the development of which highways are essential.

"The construction and maintenance of good roads has been accepted universally as a function of government."

The Court well says that road districts do not ordinarily take the form of improvement districts or betterment districts based on local benefits, but follow the theory of ad valorem assessments and taxation, because of the fact that roads are the avenues or arteries of transportation and commerce.

Roads cost money, and money is available for such purpose only through taxation.

If railroad corporations and other corporations are to be exempt from taxation for these purposes, then our entire system of highways must soon collapse.

Of course, we do have certain classes of improvement districts not supported by direct taxation, such as drainage districts, street paving districts and other districts of that character, but for all practical purposes our entire system of modern highways all over this country, in every state, is being constructed and maintained by ad valorem taxation.

The Court, in the Wight case, supra, well says, with reference to these road districts:

> "There is an absolute presumption of benefit from governmental activities of this character."

Inequality is inherent in all taxation and in all governmental activities.

Approximate equity and justice is all that we can ever hope to attain in taxation.

The property of bachelors and of maiden ladies is assessed for the education of children.

Transportation is just as much a function of civil government as education.

In the instant case we have a district of unusual merit, small, but compact and important in the enormous volume of its resources and business.

It means prosperity and wealth to appellant and its owners, who are delighted to receive the benefits of such district, but seem determined to repudiate its obligations.

As to the value, advantage or benefits of this road system in Tishomingo County, appellant insists that no such value or benefit accrued to the Memphis & Charleston Railway Company. That was, however, an issue under the pleadings and testimony in the lower court, and also in the Supreme Court of the State of Mississippi.

Such issue was decided against appellant by both courts.

Hon. Allen Cox, Chancellor, in connection with his decree dismissing complainant's bill, also rendered a written opinion constituting an official finding of the facts in this case, as follows, to wit:

> "The case to be decided now before the Court is a very grave matter; possibly the most important litigation that has been before a Mississippi Court in the present generation.
>
> "I think the proper thing is for the Court to state what his ideas and findings are with reference to the facts in this case.
>
> "There has been a great deal of testimony in this case since it has been sifted down which, in my opinion, is utterly immaterial to the issues involved.
>
> "The Oldham Road District, as has been shown by the testimony and exhibits in this cause, contains apparently a small amount of improved roads, which is not parallel to the complaining railroad, but which is in the nature of a short lateral road. There can be no question in this lawsuit, under the proof in this

case with reference to this particular district, of any competitive operation of the road in question and of the railroad. The road in question, in my judgment, has a tendency and will tend directly to slightly increase the revenues of the railroad, in that it has opened up a small territory which has furnished and will probably continue to furnish a small amount, at least a comparatively small amount, of pulpwood and timber for shipment over the line of the railroad. I think the testimony in this case shows that indirectly the road will be of some considerable benefit to the railroad, in that it will have a tendency to settle labor conditions and aid in the operation of the two gravel pits within the district, which annually furnish a large amount of tonnage for the complaining road.

"That, in my judgment, is a fair statement of the facts connected with the district, in so far as it touches the question of whether or not the railroad will be benefited directly, and in a sense, indirectly, by securing increased traffic, because of the location of this road.

"When we get to the legal features of this lawsuit, there are some very troublesome questions involved in it, to my mind. I have studied carefully the Archer County, or Browning case, decided in the United States Supreme Court, having tried to analyze that case and apply the holdings of the Court to the facts in this case and to the Mississippi law, and I am of the opinion that the Browning case does not apply, either to the facts of this particular District or to the Mississippi statutes. There is, to all intents and purposes, a finding of fact by the Supreme Court in the Browning case, that the property of the complaining

parties received no benefit whatsoever from the organization of the road district. That, I do not think, is a fact in this case. I think there is a material difference in the Texas road law, which was condemned in that case, and the road law in Mississippi. According to the Texas law, as interpreted by the United States Supreme Court, the action of that County Board was purely ministerial; there was no discretionary power vested in them, no judicial power vested in them, but they must actually organize the district, must issue the bonds, provided a proper petition be filed and an election called, which results in favor of the bond issue.

"I do not so construe this Mississippi statute. I think our Constitution and our statute placed full power over roads, bridges and ferries in our Board of Supervisors, and my judgment is that when a petition, seeking to have the creation of a road district, is filed by the required number of qualified electors, there still remains in the Board of Supervisors the discretionary power to refuse to create that district, if in their sound judgment that district should not be created.

"There is also the right of appeal to the Circuit Court, and from the Circuit Court to the Supreme Court, from every action of our Board of Supervisors, and in my judgment those two conditions differentiate the Mississippi law and the facts in this case, from the law and facts as announced in the Browning case.

"The argument of counsel for the complainant, that the District here in question has issued in the aggregate more than 15 per cent of bonds against its taxable valuation, is a persuasive argument, and was very

forcibly presented, but I am of the opinion that the Supreme Court of Mississippi has, in the case of Wright v. the Board of Supervisors of Lauderdale County, 124 Miss., page 4, settled that question adversely to the contention of complainants in this case.

"A still more persuasive argument was made by counsel for the complainant, that the immense amount of the assessment against the railroad companies for this type of improvement was manifestly unfair and confiscatory, and violates the Fourteenth Amendment to the Federal Constitution. However, I am of the opinion that the State Court and the Federal Court, including the United States Supreme Court, have held that an ad valorem tax placed on all property in the District was one of the fairest measures of ascertaining how taxes should be levied and collected for the majority of districts, such as the one in question, and therefore I think that question is determined contrary to the position of complainant.

"The question then arises as to whether or not the alleged failure on the part of the Board of Supervisors of Tishomingo County to have the proof of publication of the notice of election on file with them when these orders were passed, would make this road district void. Granting, for the sake of argument, that this contention as to the fact be true, I think the Legislature in the validating act, ratifying the proceedings of the Board of Supervisors in creating the Oldham Road District, could do in that validating proceedings anything which they might have done lawfully in the beginning. I think that it was within the power of the Legislature of the State of Mississippi to have provided that it was not necessary to

have on file the proof of publication, but they might have provided that publication could be proven by other methods of proof, such as those that have been introduced into this record this afternoon, and being of the opinion that they could have provided a different and specific method of proving this, I think they had power to ratify it.

"With these views of the Court, it would necessarily follow that complainant's bill must be dismissed.

"Under these views, it is not necessary for me to determine the question of laches or estoppel, which is raised in this lawsuit, and this Court, therefore, says nothing about either of those questions and expresses no opinion on them, because the Court is of the opinion the suit is determined along other lines and on other issues."

The Supreme Court of Mississippi, in its opinion in this case, held on such controverted issue of fact that the assessment against appellant "* * * would benefit appellant's business as a common carrier, both directly and indirectly * * *."

The Court said:

"All property in the district involved in this case, both real and personal, on which an ad valorem tax is levied for general state and county purposes is likewise levied for road purposes of the district. Appellant lays stress on the following facts: The area of the district is 2,950 acres, of which appellant owns only 57.79 acres, which is 1.9 of the whole acreage; the assessed valuation of appellant's property in the

district is 62.39 per cent of the entire assessed valuation of the district. The evidence showed, however, that the proceeds of the bonds issued for the district had been expended on public roads, and none of the roads constructed ran parallel with the appellant's line of railroad, but nearer at right angles with it; that the road district was composed of a little less than five sections, but that the sections were not strung along, one after the other, so as to take in as much of appellant's line of railroad as could be done; and, furthermore, the evidence tended to show, and the Chancellor found as facts, that the improved roads in the district would benefit appellant's business as a common carrier, both directly and indirectly—that the direct benefit would be derived from an increased tonnage for appellant from the gravel mines in the district, which gravel mines were made more accessible to miners by virtue of the improved roads. In other words, that the improved roads increased the labor facilities in the gravel mines to such an extent that the output of the mines would be materially increased, the output of the mines being transported alone over appellant's lines of railroad. We are unable to see that the operation of the statute has worked any arbitrary and unreasonable discrimination against appellant. We do not think the cases relied on by appellant at all decisive in favor of appellant's contention."

The aforesaid adjudications by the Chancery Court of Tishomingo County and by the Supreme Court of the State of Mississippi are abundantly supported by the testimony

in this case, especially by the evidence of S. H. Allen, a witness on behalf of defendants, appellees here.

Mr. Allen was general manager of Allen Gravel Company, a corporation engaged in mining gravel, or in the operation of a gravel pit, a civil engineer, a man engaged in the gravel business and familiar with the conditions prevailing in the pits situated in the Oldham Road District for nineteen years, "since 1909" (Rec., p. 162).

He testified that there were two companies or corporations engaged in the operation of these pits in that district—the Allen Gravel Company and the Memphis Stone and Gravel Company (Rec., p. 162).

Because of the weight and value of the testimony of this witness we quote at considerable length therefrom, as follows, to wit:

> "Q. Mr. Allen, are you familiar with the home life and economic conditions, generally, throughout the Oldham Road District?
>
> A. Yes, sir.
>
> Q. How much of your time do you spend out there in that district, Mr. Allen?
>
> A. About 365 days in the year.
>
> Q. That puts you in touch with the citizens and all the conditions out there, does it, Mr. Allen?
>
> A. Yes, sir.
>
> Q. Mr. Allen, through your conference relations with the Memphis Stone and Gravel Company, are you familiar with the (fol. 216) quantity and extent of business done by the Memphis Stone and Gravel Company?

A. Yes, sir; I saw a comparative statement of their tonnage at a rate hearing in Memphis some time last year.

Q. Then, through the shipments and operations out there, are you personally familiar with the business done by them, like you are yours, somewhat?

A. Yes, sir.

Q. Mr. Allen, can you tell the Court what revenues that community affords the Memphis & Charleston Railroad Co., say for the years 1926 and 1927?

A. Well, in 1926, the Allen Gravel Company shipped 200,200 tons; the Memphis Stone and Gravel Company, from their statement I saw——

Complainants object to statement witness saw of Memphis Stone and Gravel Company, because their books can be produced and best evidence.

The Court: I think, when it comes to accurate evidence, their books would be the best evidence, but I think the witness can testify from his own personal observations; he can state whether they shipped large quantities of gravel.

Excepted to.

Q. From your knowledge, are you prepared to say how much gravel they shipped in 1926-27?

A. They shipped the same as we did. In 1927 we shipped 215,000 tons and, from my observations, I would say that the Memphis Stone and Gravel Company possibly shipped from, probably from 15 to 30 tons more than we did in 1927.

Q. Well, in cars, about how much would that run?

A. About 8,000 to 8,500 cars in 1927; about 7,800 to 8,000 cars in 1926.

(fol. 217). Q. Mr. Allen, are you familiar with the destination of these shipments, somewhat?

A. Yes, sir.

Q. About what revenue came to the Railroad, per ton, or per car, would you say?

A. The minimum freight rate we ship gravel on, either the Memphis Stone and Gravel Company, or Allen Gravel Company, is 47 cents per ton, and has been since 1922.

Q. What percentage of those cars do you say they would get the minimum rate on?

A. Possibly a tenth of the shipments.

Q. Where does that go to?

A. Goes to Corinth and Alcorn County. The majority of this gravel is shipped from Gravel Siding or Oldham; either will take an average freight of 70 cents a ton.

Q. An average freight of 70 cents a ton?

A. Yes, sir.

Q. What majority; now what majority——

A. Practically the balance of the shipments; a car of gravel will run, according to our average and Memphis Stone and Gravel Company, from our observations, loads about the same weight, around 57.8 tons per car. That is our general average for the last five years, and figured on a 60-cent freight rate, even, I believe, would—the freight would run around $40.00, or better, per car.

Q. Is that a very conservative estimate?

A. Very conservative; yes, sir.

Q. Mr. Allen, what other revenue or patronage do the citizens of that vicinity, of Oldham Road District, afford the Memphis & Charleston Railway Company?

A. Considerable pulp-wood put on, considerable

lumber (fol. 218) has been loaded in the last year or two at Morrison, south of Oldham.

Q. What relation does the construction of that road have, do you think?

A. It gives the people access to Oldham switch and most of the way to Morrison switch, whereby they could haul material down there and load it much more conveniently and much better than they could have otherwise.

Q. Now, Mr. Allen, does any other railroad get any of the benefits, any revenue or patronage from this vicinity, except this railroad company you speak of?

A. Yes, sir; on joint hauls the other railroad does.

Q. I mean out there?

A. No, sir; no other railroad out there.

Q. Now, Mr. Allen, what freight, incoming freight revenue, comes in that community, as patronage of this Memphis & Charleston Railway Company. Much or little?

A. Not a great amount, Mr. Cunningham, I should imagine; this is only my observation or best judgment; there is probably $20.00 a day incoming freight to the two pits.

Q. And now, to the community around about there?

A. That would be only guess on my part; I could not say.

Q. I believe some of your citizens run a store out there?

A. Yes, sir; one or two little stores out there; two stores out there.

Q. Were they located before or after the improvements in question here?

A. Both located—one located after the improvements, and one before.

Q. Now, Mr. Allen, are you prepared to give us a reasonable estimate of the total revenue afforded to the M. & C. (fol. 219) Railway Company by pits and citizens out there, annually?

A. Well, from the amount of cars have estimated the two pits ship a year, and conservative estimate of the minimum freight, the gravel alone would be something like $250,000 in a year.

Q. You mean freight revenues to the company?

A. Yes, sir.

Q. Memphis & Charleston Railway Company?

A. Yes, sir.

Q. All right, what would you estimate the other, outgoing freight, Mr. Allen?

A. That is hard for me to say, because do not know the freight rates on lumber and pulp-wood and things of that kind.

Q. You hardly willing to make an estimate?

A. Hardly willing to make an estimate, because would be purely guess.

Complainants object to all this testimony in reference to the amount of freight, gravel, being shipped from these two pits, from this witness, the exact amount of freight can be produced from the records, and that has been waived; objection overruled; excepted to.

Mr. Cunningham: What records you mean?

Mr. Mitchell: Records of the M. & C. Railway Company.

The Court: I think the witness hasn't been called on to give absolute figures. Of course, if that was the case, he would have to have the records; he has been called on to give the situation, generally, from his

observations; while his observations may not be binding on the Court, I think he is entitled to put that in the record.

Excepted.

Mr. Cunningham:

[fol. 220] Q. Mr. Allen, is that an accessible record of the number of cars going out from the Allen Gravel Company pit?

A. Yes, sir.

Q. Before we close, will you furnish the exact number of cars as per your record?

A. Yes, sir. Will take me some little time to telephone to Memphis to have them sent out here, but I can send them in a day or two; we have every car we shipped and the exact amount of tonnage.

Q. Well, it is not that necessary to be exact. Now, Mr. Allen, you said the conditions that existed out there previous to these improvements, were bad. What were the road conditions out there previous to this improvement?

A. You mean the general road conditions?

Q. Yes, sir.

A. Well, we had two trunk-line highways built out in that county; one considerably north of the pit, and one south of the railroad, and the Oldham Road District was absolutely a trail, as far as a highway was concerned; people could not get over it very well in the wintertime on account of the mud and bad conditions that existed on it.

Q. Where did your labor live?

A. Practically all my labor lived on the Oldham Road District.

Q. And prior to the construction of the road, did they live in that vicinity?

A. Yes, sir.

Q. What about the labor that operated the Memphis Stone and Gravel Company; where did they live, if you know?

A. Considerable of them lived on the Oldham Road District and considerable lived at Oldham.

Q. The condition you described that surrounded your labor out there, does that have application to [fol. 221] the Memphis Stone & Gravel Co., labor also?

A. Yes, sir; I think it does.

Q. Situated as you were before this improvement out there, that is, the Allen Gravel Company and the Memphis Stone and Gravel Company, what disadvantage were you under relative to keeping labor out there and operating your pits?

A. Well, I couldn't truthfully say what the Memphis Stone and Gravel Company conditions were, because I did not watch their labor to that extent, but it was rather hard for us to keep labor, specifically skilled labor.

Q. Why?

A. Because had no schools and had no roads to go to and from the pit, and it was impossible for us to keep absolutely first-class labor unless we permitted them to live in Iuka, which was very inconvenient, and had it not been for the building of the road and the school, it would have considerably hampered us in the operation of the Allen Gravel Company, and possibly if it had continued for an indefinite length of time, might have put us out of business, for labor.

Q. Now, Mr. Allen, your competitive industries over the country generally; were your competitors so

hampered over the country about their roads and schools, cheaper freight, and things of that kind?

A. No, sir; our competitors at Columbus are located absolutely on a road and located convenient to schools and other competitive concerns.

Complainant objected to conditions of the surroundings and other circumstances of these other gravel pits there and in the State of Mississippi and farther south, and Columbus, going into this record.

By the Court: I think you will have to confine the testimony [fol. 222] along the line of conditions in the Oldham Good Road District, and what effect the building of road in question had or would have on the particular conditions out there, regardless of what might have been in other places.

To which defendants excepted.

Q. Now, Mr. Allen, that unrest you speak of out there among your labor, that you speak of because of the want of roads, and inability to go to school and church, did that unrest—was it manifested in the Memphis Stone & Gravel Co. labor, as well as your labor?

A. Mr. Cunningham, I made the statement a while ago I could not intelligently answer that question, because I am not absolutely familiar with the Memphis Stone & Gravel labor.

Q. Well, did the same conditions and environments surround one pit that did the other?

A. Yes, sir; same conditions and environments surrounded one pit as the other, but whether or not their labor was dissatisfied or not, I could not positively say.

Q. Now, since the construction of this road, has your business increased or decreased?

Complainants except to the foregoing question, on the ground that it is incompetent and irrelevant, not having shown the cause of any decrease or increase in the construction of the Oldham Road District, and in our opinion is not competent on the issues in this case.

By the Court: Gentlemen, I will let you put that in there under a reserved ruling, however with the explanation of the Court: You will have to show, before the Court will consider that much is competent, you will have to show the construction of the road the increase.

Excepted to.

[fol. 223] Q. Has it increased or decreased?

A. Yes, sir; it has increased.

Q. Mr. Allen, could that increase have come about if that same condition of unrest of your labor had existed that you spoke of immediately prior to the construction of this improvement; could that increase have come to you?

A. I do not think we could have increased our business had it not been for the labor being satisfied.

Q. Do you think you could have handled your business?

A. No, sir; I do not.

Q. Was the increase for 1926; has it been small or great?

A. It has been rather considerable; much more so than it was from 1925 to 1926.

Q. What has been the effect of this improvement out there on the development of the community, farms and farm houses and fields and lands?

A. Been considerable improvement in the way of

farm houses being built, and been a little mercantile business established out there and a dairy established since the road was built; been considerable acreage cleared up.

Q. What effect does that have on the revenues of the railroad in that community?

A. I could not say exactly what the exact revenues has been, but the general revenues has been increased on account of that."

This witness knew exactly the shipments by his own organization, the Allen Gravel Company, for the years 1926 and 1927, also for other years.

He knew of his own knowledge the approximate and relative shipments by his competitor, the Memphis Stone and Gravel Company. Such shipments were not competitive business as between different railroad companies, but originated only on appellant's line or lines.

Mr. Allen gave the Court the benefit of his comprehensive knowledge and information, not conjecture, not guesswork, but personal knowledge.

Under such circumstances, thoroughly familiar with the gravel business, a man of intellectual ability, informed on freight rates and other incidents thereto, this witness fixed the approximate gross receipts or freight charges from those gravel pits at $250,000.00 per annum.

The alleged discrimination and confiscation of appellant's property in the Oldham Road District, asserted by appellant in its brief, is based entirely on percentages of **area**, not on **valuations**.

It may be true that said district includes 2.88 miles of the railroad's right of way from east to west (Rec., p. 204).

It may also be true that appellant's main track is assessed by the State Tax Commission in accordance with law at $35,000.00 per mile and its sidetracks at $4,500.00 per mile (Rec., pp. 118-123).

It may also be true that appellant owns only 1.9 per cent of the acreage in the Oldham Road District, and that it is assessed with 62.39 per cent of the taxes within said district (Rec., p. 120).

This does not prove or tend to prove discrimination against appellant.

Acreage is not the basis of ad valorem taxation, but **adjudicated values.**

No evidence in this case establishes that the assessments of the railway company are **too high** or that the assessments of other corporations and individuals in this district are **too low.**

If appellant owned, not in area but in value, 62.39 per cent of the assessable property situated within said district, then its complaint against the assessment attacked in this litigation as arbitrary and confiscatory is without merit.

This is in fact the legal status of such proposition.

The value of appellant's property has been fixed by solemn judgment of the State of Mississippi on a certain basis.

By similar judgment of another department of the state the value of all other property in such district has been settled. Such adjudications constitute final judgments by the respective taxing authorities of said state, from which no appeals have been taken.

Appellant has acquiesced in such assessment and has paid all other taxes in Tishomingo County, both state taxes and county taxes, on the basis of such assessment.

The fact that its land may have been assessed on a valuation of $1,958.00 per acre under such judgment, while other lands have been assessed at a valuation of $23.00 per acre under a valid judgment accordingly to which no objection is made in this record, is absolutely immaterial in the instant cause.

If appellant pays 14 per cent of all taxes in Tishomingo County, that is because under the adjudication and judgment of the State of Mississippi, it owns 14 per cent of all property in Tishomingo County, in value.

If it pays 27 per cent of all taxes in the first district of that county, such taxation results from the adjudicated ownership of 27 per cent of the value of all property therein.

If it pays 37 per cent of all taxes in the Lee Highway District of said county, that is because it owns 37 per cent thereof under a valid judgment rendered by the taxing authorities of the State of Mississippi with the consent and acquiescence of the Memphis & Charleston Railway Company.

Its complaint against an assessment of 62 per cent approximately in what it calls a "special district" where it owns approximately 2 per cent of the land therein contains just two fallacies.

First. The Oldham Road District is not a special district, or betterment district, but is an ad valorem district.

Second. All ad valorem taxation is based, not on area or acreage, but on values.

Any individual or corporation might own 2% in area of all land in a given territory, but because of extensive improvements thereon, the value of such property for taxation might be 62% or 80% or 90% of all property in such district.

If appellant and its affiliated corporations paid during the year 1926, taxes in the "enormous sum of $10,350,000," that must have been because such corporations owned sufficient property in the various states where they do business to justify the imposition of such taxes.

Appellees did not institute these proceedings, but appellant was complainant by its original bill and amendments thereto in the trial court.

The burden of proof was, therefore, on the Memphis & Charleston Railway Company, as such complainant, to maintain, by testimony, the allegations and issues of such bill.

The sole theory of appellant's case in the trial court was that taxation without benefit or advantage to its property would result in the arbitrary confiscation thereof.

That was an issue of fact.

Appellant having, by its bill, submitted such issue to the trial court for adjudication, was under obligation to show that such assessment and taxation was arbitrary and that its property had not received and did not receive commensurate benefits or advantage therefrom.

With able and distinguished counsel, fully advised of its rights, appellant wholly failed to maintain its position by evidence and to meet the burden of proof, under its original bill.

The Memphis & Charleston Railway Company, from the date when its original bill was filed, May 13, 1927, down to the trial of this case in the lower court, on the 11th day of February, 1928, with the administration of its freight department, its passenger department, and its various accounting departments, subject to the advice and instructions of its legal department, made no effort whatever, by comparative records, to maintain its position.

If taxation against appellant in the Oldham Road District was arbitrary and confiscatory, its records would have shed great light on such affirmative allegation of its original bill.

Appellant could, of course, if it had desired to do so, given to that Court and to this Court the exact gross receipts and net revenue to it from all shipments out of the Oldham Road District.

For purposes of their own, appellant did not divulge such information by the testimony of its efficient experts.

This record, therefore, shows that the approximate gross

revenue or receipts to the railroad company from the Oldham Road District must have been probably two hundred fifty thousand dollars ($250,000.00) per annum, and perhaps more than that, including other incidental income.

Against this enormous revenue, appellant now protests the payment of taxes on the bonds of such district in the modest amount of four hundred fifty dollars ($450.00) per annum.

Under the testimony of C. N. Freeman in this record, appellant's tax commissioner, this company would have had to pay the approximate **principal** of four thousand dollars ($4,000.00) on these bonds, an infinitesimal sum in comparison with the wonderful business derived from that territory and the assets thereof.

We are living now in a new day. Every intelligent executive of these great railroad organizations must recognize this condition.

The day of the old mud road and the little red school house on the hill is ancient history.

Without aeroplanes, automobiles, gasoline, oil, lumber and the other commodities involved in our modern system of transportation, and essential thereto, no railroad company could exist. Henry Ford and the General Motors Corporation have paid millions and billions of dollars to the railroad companies of this country in freight on automobiles, including equipment and materials therefor.

Without automobiles in appellant's territory its railroad track would soon be dismantled in order that its rails

might be used elsewhere or sold for junk; but yet they are unwilling to pay their proportionate taxes for improved roads without which we would have no possible system of modern transportation such as is enjoyed by the other forty-seven states of this country.

The Court, from the testimony of appellant's witnesses Rice, Forline, White and Davis, will readily discover the railroad theory of improved roads.

In short, appellant and its witnesses are thoroughly in favor of good roads, automobiles, modern transportation, shipments of cars, parts, equipment, oil and gasoline, but they demand that all improved roads shall be constructed at right angles to the railroad's line of track.

They are in favor of right-angle roads, but they are opposed to parallel roads.

This may be a proper attitude, but we doubt it.

For instance, Corinth, Mississippi, is located about thirty miles west of this Oldham Road District.

That city has three great railroad lines.

The Illinois Central runs from Jacksonville, Florida, to Chicago and to St. Louis.

The Mobile & Ohio Railroad runs from Mobile, Alabama, to St. Louis, Missouri.

The Southern Railway, including appellant's section or segment of its route, runs from New York to Memphis, Tennessee.

These roads go through Corinth in three different directions:

First. From northwest to southeast.
Second. From north to south.
Third. From east to west.

The difficulty about this railroad theory for an improved system of rock roads or concrete roads is therefore evident.

It is a reductio ad absurdum.

Those right-angle roads to appellant's track would be parallel to the Mobile & Ohio track and would be approximately parallel to the Illinois Central track.

The vital necessity and universal demand for good roads is well stated by the Supreme Court of Texas in **Aransas County v. Coleman-Fulton Pasture Company**, 108 Tex. 216, 191 S. W. 553:

> "Upon the general subject of road improvement it marked a radical departure from the previous policy of the state. It was the response to a public demand that provision be made whereby the state, and every section of the state, might be supplied through voluntary taxation with adequate, durable and permanent roadways.
>
> "In a word, the purpose of this amendment plainly was to provide the means of building and maintaining not alone neighborhood, precinct or even county roads, but adequate road systems throughout the entire state, to be availed of by larger or smaller areas, as might be desired, so as to afford, through the exercise of a

liberal taxing power widely distributed, adequate and continuous highways through every section of the state. Such a purpose stands out boldly, we think, in the broad and sweeping provisions of the amendment."

Railroad revenue is derived from two sources:

(1) Old business.

(2) New business.

Any railroad that depends on either **old business** or **new business** only for its maintenance and development will soon die of dry rot or gangrene.

Old business must be conserved, encouraged and protected.

New business must be invited by an attitude of equitable co-operation.

The Oldham Road District as a source of railroad revenue is a wonderful territory. Probably no other rural territory in our state will bear comparison with it; equal, perhaps, to an oil field or to the mining districts of Alabama or Tennessee.

The successful operation of the great gravel pits of Tishomingo County, in the future, as in the past, is a competitive proposition.

It takes labor to mine gravel, just like coal or iron. Labor must live, just like railroad officers. This means homes, schools, churches, roads and the other concomitants of organized society. No community without these conditions and advantages can enjoy any reasonable degree of prosperity, that homogeneous prosperity, which means

substantial development of industry and resources. Without improved roads in the Oldham Road District, sooner or later it would mean no schools, no churches, no homes, no families, no labor, no gravel pits, no freight, no revenue to the Railway Company that now enriches itself from the people and the assets of that territory.

The history and evolution of transportation in this country is an epic.

From the Indian trail and the bark canoe, we have come through various stages to the electrified railroad and the ocean liner, to the Panama Limited, to the Seminole, to the Memphis Special over appellant's lines, to the American.

We have come to the concrete road, the truck, the limousine. These modern developments are an answer to the problem of safe and quick transportation. Railroad protest and resistance to the Ford, the Lincoln, the Cadillac, or the G. M. C. truck will do no more good than the river's old antagonism to the railroad. The present system of transportation is a concomitant of modern civilization.

Highways must be paid for. That takes money, and money is derived from taxation.

The sooner railroads recognize that compositions on "special benefits" and "competitive transportation," injunctions and litigation do not constitute an answer to the issues of today and tomorrow, the better.

Browning v. Hooper, 269 U. S. 396, 70 L. Ed. 330.

This now celebrated case, from the State of Texas, was decided by this Court on the 4th day of January, 1926. The decision, eminently right on the facts of the case, was, however, at first misunderstood, and, therefore, being misunderstood, created some uneasiness in certain of the states which had enacted statutes for the organization of road districts and whose road system had been built up through the medium or agency of such districts.

The Legislature of Mississippi convened in regular session two days later, namely, on January 6, 1926, and immediately took suitable measures to forestall any conclusion that its system of roads had been built by road districts such as had been organized in Texas and such as had been condemned in Browning v. Hooper.

But this attitude did not constitute any recognition whatever by Mississippi that Chapter 277, Laws of 1920, came within the condemnation of this Court in Browning v. Hooper, but was merely in pursuance of a commendable public policy for the preservation of the integrity of the state and of every organization or taxing district of the state against any possibility that might result from any misunderstanding of the Texas case.

Chapter 278, Laws of 1926, became effective on the 15th day of March, 1926, a general statute intended to validate as legislative districts all road districts created and organized prior thereto.

Chapter 1080, Laws of 1926, had been previously approved on the 11th day of March, 1926, validating the organization of the Oldham Road District.

Chapter 225, Laws of 1926, was thereafter approved on the 19th day of March, 1926, providing a future method for the organization and operation of road districts in Mississippi.

Other statutes were adopted at the same session of the Legislature providing the system and machinery by which the integrity and honor of the state and its various subdivisions should be saved and guaranteed against repudiation.

We will now undertake an analysis of this Browning-Hooper case on its facts and its law, as contradistinguished from our instant cause, entirely independent of the legislative validation of the Oldham Road District; or, in other words, as that district stood on its facts under the law at the date of its original organization on the 1st day of February, 1926.

In **Browning et al v. Hooper**, 269 U. S. 396, appellants filed suit to restrain the issue of $300,000.00 bonds of Road District No. 2, Archer County, Texas, proposed to be sold to obtain money for specified improvements on designated roads wholly within such district and to restrain the levy or collection of any tax upon the property to pay any part of the interest or principal of the bonds, it being contended that the creation of such a district and the enforcement of

the proposed tax deprived appellants of their property without due process of law, in violation of the Fourteenth Amendment. The District Court dismissed the complaint, and the decree of the District Court was reversed by the United States Supreme Court.

> "Archer County is about thirty miles square, and has a population of between 5,000 and 6,000. The principal place is Archer City, the county seat, located about five miles south and three miles east of the center of the county. Road District No. 2 embraces approximately the northerly half of the county, including a part of Archer City. The Ozark Trail is a federal-aided state highway, and about twenty miles of it extends diagonally across the northwesterly part. Dundee is located on it about two miles from the west line of the county. There is a highway extending from that place to Diversion Dam, about six miles northwest. About eighteen miles of the Southwest Trail lies between Archer City and a point on the north line of the county, about six miles from its northeast corner. There is another highway extending from a point on the Southwest Trail about two miles south of the county line to Holliday, on the Ozark Trail, about six miles west. These roads are within the road district, and the bonds issued are to raise money to improve them."

Seventy-four persons presented the Commissioners Court a petition for an election on the proposed bond issue. The Commissioners Court, pursuant to said petition, established

the district and called the election, which resulted in 303 votes for and 102 votes against the bond issue.

Before the election was called the Court determined that the proceeds of the bonds, if voted, or so much as might be necessary, should be expended for the roads above described.

> "The appellants' lands—24,900 acres in all—are in the northeasterly part of the county. All but one of the petitioners are residents of the part of Archer City that is within the road district. Archer City, Dundee and Holliday furnished 252 votes for the bond issue—more than twice the number cast against it. Nearly all the votes cast in the northeasterly part of the county were negative. The taxable property in the district is assessed at $5,683,359.00, of which $257,080.00 belongs to appellants and $111,388.00 to petitioners, and $60,500.00 of that amount belongs to one signer, leaving only $50,888.00 to the other seventy-three. The part of the district in which appellants' lands are situated is tributary to Wichita Falls, which is outside Archer County, but near its northeast corner."

The case of **Browning v. Hooper** is distinguished from the instant case both on the facts and on the law, as follows:

First. In the instant case the Chancellor, in his opinion, held that the road in question has a tendency and will tend directly to slightly increase the revenues of appellant in that it has opened up a small territory which has furnished and will probably continue to furnish a small amount of pulp wood and timber for shipment over the line of appel-

lant; that indirectly the road will be of considerable benefit to appellant in that it will have a tendency to settle labor conditions and aid in the operation of two gravel pits within the district which actually furnish a large amount of tonnage for appellant.

> "This is a fair statement of the facts in so far as it touches the question of whether or not the appellant will be benefited directly or indirectly by securing increased traffic because of the location of this road."

Such adjudication on the facts was approved by the Supreme Court of Mississippi.

In the case of **Browning v. Hooper**, the Supreme Court of the United States held that "the improvement of the roads designated will not benefit the property of appellants."

Second. The inclusion of appellant's land in one road district in the instant case does not, under the statutes and decisions in the State of Mississippi, prohibit the creation of a new road district to include appellant's property.

The Oldham Road District is a legislative district by the specific statutes of 1926, which is a conclusive answer to appellant's contention that the bond issue of $6,500.00 exceeds the limits permitted under Section 3, Chapter 277, Laws of Mississippi 1920.

However, entirely independent of such legislative validation, we will, without difficulty, be able to demonstrate the

fallacy of such position by the terms of the very statute invoked by appellant and also by Chapter 207, Laws of Mississippi 1920.

Section 3, Chapter 277, Laws of Mississippi of 1920, in part, reads as follows:

> "Then it shall be the duty of the Board of Supervisors to issue the bonds of such supervisors' district, or districts, in any amount not to exceed fifteen per centum, provided in no county or district shall bonds in excess of 15 per cent of the assessed valuation ever be issued of the assessed value of all the taxable property of such district, or districts." * * *
>
> "That any county or supervisors' district or part of supervisors' district or districts which have heretofore issued bonds in said county, supervisors' district or parts of supervisors' district or districts to an amount of ten per cent of the assessed valuation of said county, supervisors' district or parts of supervisors' district or districts, may, under the provisions of this act and in pursuance thereof, issue bonds in addition to those already issued if bonds have heretofore been issued to an amount of ten per cent of the said assessed valuation to an amount not in excess of five per cent of the assessed valuation of said county, supervisors' district or parts of supervisors' district or districts."

This chapter amends Chapter 176 of the Laws of Mississippi of 1914, which, under section 3, fixes a limit of ten per cent of the assessed value on the amount of bonds issued by such districts, the latter quotation under Sec-

tion 3 of Chapter 277 of the Laws of Mississippi of 1920, in view of **Love v. Board of Supervisors,** 111 Miss. 802, 72 So. 230, followed by **Payne v. Board of Supervisors,** 141 Miss. 167, 106 So. 625, which former decision, not having been modified by the Legislature, is adopted as a construction of Chapter 277 of the Laws of Mississippi of 1920, was merely added to permit road districts created under Chapter 176 of the Laws of Mississippi of 1914 to increase their bonded indebtedness from ten per cent to fifteen per cent and not to fix the limit of fifteen per cent on the aggregate bond issues of all taxing districts, included either in whole or in part within road districts authorized to be created under Chapter 277 of the Laws of Mississippi of 1920.

The construction is further supported by Chapter 207 of the Laws of Mississippi, approved March 27th, 1920, one day after Chapter 277 of the Laws of Mississippi, which was approved March 26th, 1920. Chapter 207 fixes a limit of 15 per cent of the assessed value of the taxable property of such county or consolidated or rural separate school district or separate road district.

This construction is further supported by **Wright v. Board of Supervisors,** 124 Miss. 4, 86 So. 643, in which case Chapter 277 of the Laws of Mississippi of 1920 was before the Court.

In **Browning v. Hooper,** "the inclusion of appellant's lands in the road district makes it impossible until the last

bonds mature thirty years hence to create another road district to raise money for the improvement of roads needed to serve the territory in which appellant's lands are situated (Complete Tex. St. 1920, or Vernon's Ann. Civ. St. Supp. 1922, Article 637 D)."

Third. In the instant case the principal and interest of the bond issue will be paid by **an ad valorem tax** placed on **all** property in the district.

The expenditure of moneys raised by the bond issue in the instant case is not limited to any **specified** roads, the roads to be improved being **designated by highway commissioners** after the election resulting in favor of the issuance of such bonds as provided by section 5 of said chapter 277. The purpose in creating the district in the instant case cannot be said to be special. The district will not cease to exist as a body corporate upon the payment of the bond debt. The district has authority, under Chapter 207 of the Laws of Mississippi, approved March 27th, 1920, one day after the approval of Chapter 277, said Laws of Mississippi, to issue additional bonds within the limitations fixed in said chapter 207; and will continue to exist as a body corporate long after the payment of the bonds involved in this litigation.

In **Browning v. Hooper**, on the other hand, the expenditure of the bond issue is limited to roads **designated in the initial petition.** The purpose was **special** and the district will cease to exist as a body corporate upon the payment of the bond debt.

As stated by the Supreme Court, "it is clear that the burdens sought to be imposed on appellants' lands are **special assessments** for local improvements."

Fourth. In the instant case, under Section 170 of the Constitution of the State of Mississippi, "the Board of Supervisors shall have full jurisdiction over roads, ferries and bridges to be exercised in accordance with such regulations as the Legislature may prescribe." Upon the filing of the petition for the creation of the Oldham Road District, the Board of Supervisors had discretionary power to refuse to create that district, if in their sound judgment that district should not be created, and no act of the Mississippi Legislature could deprive them of this constitutional right and duty to exercise such discretionary power.

Further, under Section 5 of Chapter 277 of the Laws of Mississippi of 1920, after the election in favor of the issuance of said bonds, it became the duty of the Board of Supervisors to appoint three commissioners for such district, said commissioners, subject to the approval of the Board of Supervisors, to determine and fix what road or roads shall be constructed or constructed and maintained or maintained in the Oldham Road District out of the proceeds of the sale of said bonds.

In **Browning v. Hooper**, the commissioners' duties in respect of the amount to be raised and the lands to be subjected to the charge were purely ministerial and confined solely to carrying out the will of the petitioners when approved at the election, the particular roads to be improved

having been designated in the original petition for such improvements and there being no constitutional provision in the State of Texas conferring upon such commissioners full jurisdiction over roads, ferries and bridges. The Supreme Court of the United States stated: "The Commissioners' Court has no power to modify or deny; it is bound to grant the petition."

Fifth. In the instant case the Legislature has delegated to the Board of Supervisors of Tishomingo County the discretionary power upon the filing of a proper petition to create the Oldham Road District, such district, when created, being a municipality to which the state has granted full legislative powers, subject to the approval of the Board of Supervisors as provided by said chapter 277. It has been repeatedly held, as stated in **Browning v. Hooper**, that the owners of property in such a district have no constitutional right to be heard on the question of benefits in such a case (**Hancock v. Muskogee**, 250 U. S. 454; **Valley Farms Company v. Westchester County**, 261 U. S. 155; **St. Louis & Southwestern Railway Company v. E. H. Nattin, Tax Collector**, 277 U. S. 157.

In **Browning v. Hooper**, on the other hand, the road district was not created by the Legislature. There was no legislative delegation of authority. The amount of the bonds to be issued and the property to be taxed are the elements which determine the burden.

These were fixed by the petition and the election. There was **no discretion** in the Commissioners' Court to issue such bonds or determine the property to be taxed.

Sixth. In the instant case, there is a right of appeal to the Circuit Court and from the Circuit Court to the Supreme Court from every action of the Board of Supervisors of Tishomingo County.

In the Browning case there was no such right of appeal.

Furthermore, the Supreme Court of Mississippi in the instant case, as per our citation, supra, draws an exceedingly clear distinction between the principles involved in Browning v. Hooper, supra, under the Texas statutes and our instant case under the Mississippi statutes.

The Supreme Court of Mississippi says (Rec., p. 234):

> "Appellant contends that Chapter 277 of the Laws of 1920 is violative of both the due-process and the equal-protection clauses of the Fourteenth Amendment to the Federal Constitution. In considering these questions, it should be borne in mind that the road district involved is an ad valorem taxing district, and not a special benefit assessment district. The property of the district, both real and personal, is taxed for state and county purposes in proportion to its assessed value upon an ad valorem basis, and is likewise taxed under the act for road purposes. The act makes no distinction between real and personal property.
>
> "The main case relied upon by appellant to sustain its position that the statute denies to the prop-

erty owners of the district due process is Browning v. Hooper, 269 U. S. 396, 46 S. Ct. 141, 70 L. Ed. 330. In that case it was held that, where a local road district was created by petition of a certain per cent of the taxpayers of the territory composing the district, and there was no legislative determination that the property in the district would be benefited by the proposed local improvement, notice to the property owners of the district, and an opportunity to be heard, was essential to due process. The Texas statute, held to violate due process in that case, did not itself create the district, levy the taxes, or fix the amount to be raised for road purposes. There was nothing in the statute to guide or limit the action of the signers of the petition in selecting the property to be assessed and taxed. Subject to a vote of the district, the territory to be taxed was absolutely fixed by the petitioners. The County Court had no power to deny the petition. It was bound under the statute to organize into a taxing district the territory as described in the petition. The Court said, among other things: 'But it is essential to due process of law that such owners be given notice and opportunity to be heard on that question where, as here, the district was not created by the Legislature, and there has been no legislative determination that their property will be benefited by the local improvement. Appellants were denied all opportunity to be heard. No officer or tribunal was empowered by the law of the state to hear them or to consider and determine whether the road improvements in question would benefit their lands. The act is repugnant to the due-process clause of the Fourteenth Amendment.'

"The Court further stated, however, that where a local improvement territory is selected and the burden is spread by the Legislature, or by some local administrative board to which the state has granted legislative powers on the subject, the property owners had no constitutional right to be heard, and, therefore, there was no denial of due process. St. L. & S. W. Ry. Co. v. Nattin, 277 U. S. 157, 48 S. Ct. 438, 72 L. Ed. 830, involved the constitutionality of a road statute of Louisiana. Under the laws of that state the police juries of the parishes are the governing bodies of the respective parishes. The statute empowered the police juries to create road districts from such portions of their parishes as they might determine, and, with the approval of the voters of the district, to issue the bonds of the district, and construct roads from the proceeds thereof. The constitutionality of the statute was challenged upon the ground that it failed to provide the taxpayers of the district with an opportunity to be heard. The Court said that the sufficiently short answer to the contention was that under the repeated decisions of the Supreme Court that was not essential; that the tax sought to be enjoined in that case was a general ad valorem tax, and that its legality did not depend upon the receipt of any special benefit by the taxpayers; that other statutes of the state provided ample opportunities for the taxpayers to contest the value of their property for the purpose of taxation; that a local legislative body, as was the police jury, when properly authorized, could levy a general ad valorem tax upon all property within its jurisdiction, including common carriers engaged in interstate commerce, without violating the Federal Con-

stitution (citing Valley Farms Co. v. Westchester, 261 U. S. 155, 43 S. Ct. 261, 67 L. Ed. 585; Hancock v. Muskogee, 250 U. S. 454, 39 S. Ct. 528, 63 L. Ed. 1081).

"Now, applying these decisions of the Supreme Court to the act here involved: If the act confers upon the Board of Supervisors the legislative discretion of determining whether or not the territory described in the petition shall be organized into a road district, notice and an opportunity to be heard on the part of the taxpayers is not required. Putting it differently, if, in the organization of a road district under the statute, the Board of Supervisors acts in a legislative capacity, and not in a judicial capacity, and has the legislative discretion to organize, or refuse to organize, the district petitioned for, as they may deem to the best interest of those concerned, then an opportunity to be heard on the part of the taxpayers is not required. Can the act reasonably be so construed?

"The provisions of section 2 of the act, which is copied in the opinion handed down in this case, furnish the principal grounds of attack on the constitutionality of the act. Appellant contends that this section of the act made it mandatory on the board of supervisors to organize the road district petitioned for, and that the board had no legislative or other discretion in the matter. We think this question has been, to a large extent, determined against appellant's contention. Chapter 277, Laws of 1920, is amendatory of Chapter 176, Laws of 1914; Chapter 145, Laws of 1912, and Chapter 149, Laws of 1910. So far as they affect the questions here involved, sections 1, 2, and 3 of the act (Sections 8429 to 8431, inclusive, of Hemingway's Code of 1927), have been substantially the same in all four acts. In Robinson v. Itawamba

County, 105 Miss. 90, 62 So. 3, a road district was organized under Chapter 149 of the Laws of 1910. The board of supervisors, thereafter, passed a resolution providing for the issuance and sale of the bonds of the district for the purpose of constructing improved highways. No further steps were taken by the board. On demand of interested parties, the board refused to proceed with the issuance and sale of bonds. Mandamus was sued out to force the board to proceed with the issuance and sale of bonds and construction of the roads. The Court held that the board of supervisors could not be forced to issue and sell bonds for two reasons, namely, because the board had the right, under the statute, to exercise its discretion as to whether or not it would do so, and that the law furnished an adequate remedy by appeal to the Circuit Court from the action of the board in refusing to issue bonds. The language of section 2 of the statute, in reference to the organization of road districts, is not any more imperative than the language of section 3, with reference to the duty of the board, to issue bonds of the district after the district has been organized. Bryant v. Yalobusha County, 133 Miss. 714, 98 So. 148, does not hold to the contrary. The road district involved in that case was organized under the statute here under consideration. It was held that, if the board of supervisors organized a road district under the act, it had to be the district petitioned for—that the board had no authority under the act to organize either a larger or a smaller district. The question whether, under the act, the board was vested with the discretion whether or not it would organize any road district whatever, was not involved nor decided in that case. In Prather v.

Googe, 108 Miss. 670, 67 So. 156, Chapter 176 of the Laws of 1914, of which the act involved is amendatory, was challenged as unconstitutional on at least two grounds, one of which was that it violated section 170 of the Constitution, in that it encroached on the jurisdiction of the board of supervisors over public highways. It is true, the identical question here involved was not decided in that case, but the Court said, in broad language, that the act did not take away from the board of supervisors its discretionary powers over public roads. Construing the statute in the light of Section 170 of the Constitution, vesting in the board of supervisors jurisdiction over roads, bridges and ferries, and the above decisions of our court, we are of the opinion that the act vested in the board of supervisors the legislative discretion to organize or refuse to organize, according to their judgment of the best interests of those concerned, the road district petitioned for; that although, under the Yalobusha County case, if a district is organized, it must contain the territory embodied in the petition—no more, no less—still the board is vested with the discretion of deciding whether the benefits to be derived from the proposed district will be justified by the necessary tax burdens. So construing the statute, it comes within the principles laid down by the Supreme Court in the Louisiana case (St. Louis & S. W. Ry. Co. v. Nattin, 277 U. S. 157, 48 S. Ct. 438, 72 L. Ed. 830), and falls without the class of statutes held by the Supreme Court as denying due process, in the Texas case (Browning v. Hooper, 269 U. S. 396, 46 S. Ct. 141, 70 L. Ed. 330)."

Justice Etheridge, in his special concurring opinion, emphasizes the statutory scheme or system in this state, clearly differentiated from the statutory provisions of the State of Texas, under which the decision was rendered in the Archer County case.

It, therefore, follows under the statutes of the State of Mississippi, as construed by its Supreme Court, that the Board of Supervisors in each county, including, of course, Tishomingo County, is a legislative board, vested with discretionary power to create road districts or to deny petitions for such purpose, as their legislative judgment may demand.

The majority opinion directs specific attention to the character of the assessment in the instant case, an ad valorem tax, as against taxation for betterments or special improvements. The Court clearly demonstrates that the practical effect of Chapter 277, Laws of Mississippi of 1920, does not under the Fourteenth Amendment to the Federal Constitution operate or impose any arbitrary and unreasonable discrimination against appellant, distinguishing the instant case against those cases cited by appellant in that court.

> "All property in the district involved in this case, both real and personal, on which an ad valorem tax is levied for general state and county purposes is likewise levied for road purposes of the district. Appellant lays stress on the following facts: The area of the district is 2,950 acres, of which appellant owns only 57.79 acres, which is 1.9 per cent of the whole

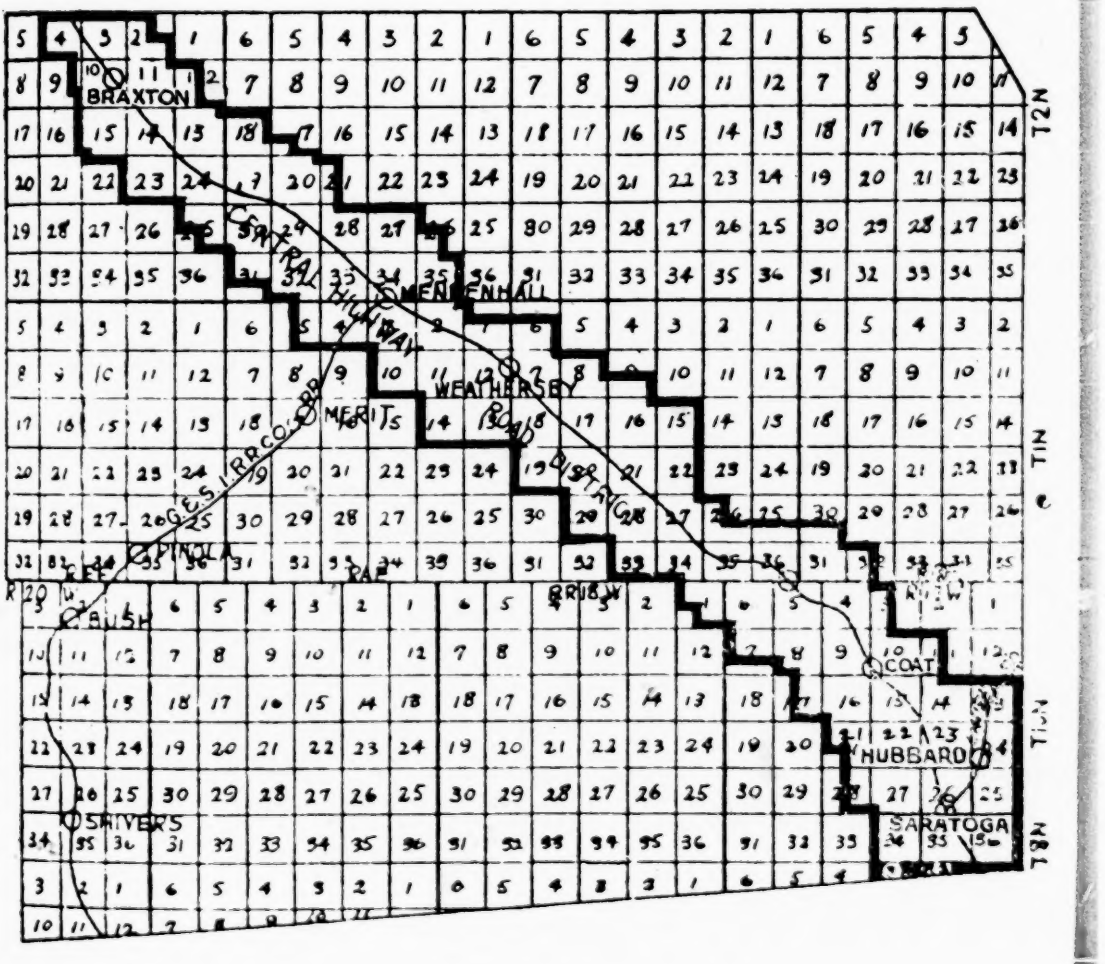
acreage; the assessed valuation of appellant's property in the district is 62.39 per cent of the entire assessed valuation of the district. The evidence showed, however, that the proceeds of the bonds issued for the district had been expended on public roads, and none of the roads constructed ran parallel with the appellant's line of railroad, but nearer at right angles with it; that the road district was composed of a little less than five sections, but that the sections were not strung along, one after the other, so as to take in as much of appellant's line of railroad as could be done; and, furthermore, the evidence tended to show, and the Chancellor found as facts, that the improved roads in the district would benefit appellant's business as a common carrier, both directly and indirectly—that the direct benefit would be derived from an increased tonnage for appellant from the gravel mines in the district, which gravel mines were made more accessible to miners by virtue of the improved roads. In other words, that the improved roads increased the labor facilities in the gravel mines to such an extent that the output of the mines would be materially increased, the output of the mines being transported alone over appellant's lines of railroad. We are unable to see that the operation of the statute has worked any arbitrary and unreasonable discrimination against appellant. We do not think the cases relied on by appellant at all decisive in favor of appellant's contention."

This clear distinction between the statutes of Mississippi and the statutes of Texas condemned in **Browning v. Hooper**, supra, is admirably discussed in what is commonly called the "Duckworth Case," which originated in the Southern District of Mississippi, being reported in

Gulf & Ship Island Railroad Company v. Duckworth, Sheriff and Tax Collector et al., 280 Fed. 733.

The Court will find in this case **so reported** a map or sketch of the Central Highway Road District of Simpson County, State of Mississippi, which was under attack in that cause.

We insert a copy or drawing thereof for consideration and analysis.



Hon. E. R. Holmes, District Judge, rendered an opinion in that case which is a model of clear expression and cogent logic.

The complainant there was undertaking substantially the same attack on the road system of Mississippi as is involved in the instant cause, the only exception being that the Duckworth case was an attack on Chapter 176, Laws of Mississippi 1914, while the instant cause attacks Chapter 277, Laws of Mississippi 1920.

Judge Holmes, in his opinion, cites **Prather v. Googe**, 108 Mississippi 670, 67 So. 156, which decision sustains the constitutionality of Chapter 176, Laws of Mississippi 1914.

Incidentally, it is entirely clear for the purposes of the instant case that the decision in **Prather v. Googe**, supra, also in effect sustains the constitutionality of Chapter 277, Laws of 1920.

If one statute is constitutional, both of them are constitutional.

If one statute is unconstitutional, both of them are unconstitutional.

The Court has held that the law of 1914 is constitutional and it certainly follows, independently of numerous decisions since the Prather case, that the laws of 1920 are also constitutional.

The opinion in the Duckworth case emphasizes the delegated legislative power and discretion to create taxing districts on the basis of ad valorem assessments.

Such decision and opinion also draws the definite dis-

tinction between our system of ad valorem taxation for the organization and operation of road districts in this state as against local assessments or betterment taxes.

> "This is not the case of a local assessment or betterment tax, charging the cost of a local improvement upon individual property in proportion to benefits estimated to accrue thereto, but is the case of the creation by authority of the Legislature of a separate special taxing district, which is made to bear the entire cost of a local improvement, to wit, a public highway traversing the entire length of the same. This cost is distributed equally upon the property in the district upon an ad valorem basis. If this distinction is kept in mind, it will serve to differentiate most of the cases cited by attorneys for complainant, notably **Kansas City Southern Railway Co. v. Road Improvement District No. 6**, 256 U. S. 658, 41 Sup. Ct. 604, 65 L. Ed. 1151, which is their main authority."

Appellant, in its brief, bases its position largely on the principles announced in **Kansas City Southern Railway Co. v. Road Improvement District No. 6**, 256 U. S. 658, 65 L. Ed. 1151.

The difficulty with appellant in the instant case is that it entirely fails to draw the distinction so admirably declared by Judge Holmes in his opinion.

This Duckworth case did not go to the Supreme Court of the United States, but was taken on appeal to the Circuit Court of Appeals, Fifth Circuit, where decision was rendered on the 7th day of February, 1923, as reported,

Gulf & Ship Island Railroad Company v. Duckworth, Sheriff and Tax Collector et al., 286 Fed. 645.

The Circuit Court of Appeals, in a cogent opinion, affirms the judgment of the District Court, dismissing complainant's bill attacking the constitutionality of the Mississippi road system.

It is true that in the Duckworth case the property owned by the Railroad Company represented in value only about one-fifth of all taxable property in the Central Highway Road District, but the opinion emphasizes the fair and equal valuation of all property in such district, including railroad property for taxation; and the Court calls attention again to the clear distinction between a system of ad valorem taxation as in this state as against an assessment for local improvements or betterment taxes as in **Kansas City Southern Railway Company v. Road Improvement District No. 6**, supra.

> "The tax was not a local assessment levied upon the theory that the improvement was a special benefit to the abutting property, but was an ad valorem tax levied on all of the property in the district, whether it abutted on said highway or not.
>
> "The case is entirely unlike that of **Kansas City Southern Ry. v. Road Imp. Dist. No. 6**, 256 U. S. 658, 41 Sup. Ct. 604, 65 L. Ed. 1151. In that case a part of the costs of a road was assessed against a railway company according to an arbitrary assessment of benefits to its property on account of its building. The manner of assessment of benefits against the railway company was wholly different from that used

in assessing benefits as to any other property in said district, and made so palpable and arbitrary a discrimination between the railway company and other owners assessed that it was held to amount to a denial of the equal protection of the laws. Here there is no assessment for a local improvement, but a special ad valorem tax levied on all the property in the road district on a valuation as to which no objection of any discrimination or unfairness is alleged."

The Court also sustained, in the Duckworth case (after declining consideration of all questions raised as to any violation of the Fifth Amendment to the Constitution of the United States, citing **Brown v. New Jersey**, 175 U. S. 172, 44 L. Ed. 119), the constitutionality of the Mississippi statute under the Fourteenth Amendment to the Constitution of the United States:

"The laws of the State of Mississippi authorize the Board of County Supervisors to create road districts and authorize the issuance of bonds for the construction of roads therein (Hemingway's Ann. Miss. Code 7158-7161). The laws of said state afford to all taxpayers the right to be heard on an appeal to the Circuit Court in regard to the levy of taxes, and also in **regard to any other decision** of the Board of Supervisors, and the railroad company, as a taxpayer, could have been heard on the proposition to create this district and issue bonds for the building of this highway. Such statutes do not deny to the appellant any rights under the Fourteenth Amendment of the Constitution of the United States (Hemingway's Ann. Miss. Code, 60, 61). Indeed, the bill makes no charge

that it could not have been fully heard before said Board of Supervisors, had it so desired."

Another most interesting case involving several of the contentions submitted for consideration by appellant in the instant case, is **Oregon Short Line Railroad Company v. Clark County Highway District from the District Court of Idaho,** Volume 22 (2nd) Fed. 681.

The Clark County District was validated by the Legislature of the State of Idaho under Chapter Four, Local and Special Laws of Idaho, 1927; and the decision which we cite was rendered by a special district court in equity composed of three judges. That tribunal declared for the validity of the district, announcing the general rule for the creation of legislative districts under **Gast Realty Company v. Schneider Granite Company,** 240 U. S. 55, 60 L. Ed. 523, and other authorities.

The facts of that case are stated in considerable detail, showing that the railroad company owned approximately one-half of all property assessed for taxation in such district.

The Court declined to say, under those circumstances, that the burden of taxation on the railroad company was either arbitrary or discriminatory, although conceding that it would be difficult to trace direct benefits to such railroad company or to measure the indirect value of the road improvement to such company.

As the opinion points out, it is often difficult to trace

and locate exact benefits direct or indirect to given property.

The Court well says in that case, as we have continued to insist throughout in the instant case:

> "As to the benefit to plaintiff, it is not merely a question of the increase of its local business, but maintaining what it has.
>
> "Highways may be quite as important in holding population and industrial enterprises as in getting them; and, if highways are to be built and maintained, how is the burden to be borne, if not in the manner prescribed?"

Appellants are protesting against that system of assessment for taxation which they themselves accept and under which they are operating today in Mississippi.

Witness for appellant, C. N. Freeman, introduces certain exhibits as follows, to wit:

Exhibit A (Rec., p. 117);
Exhibit B (Rec., p. 120);
Exhibit C (Rec., p. 135).

These exhibits in connection with the testimony of this witness, and other witnesses for appellant, conclusively demonstrate acceptance and acquiescence by appellant in the payment of state taxes and county taxes on all property in Tishomingo County, in the first supervisor's district of said county, in the Lee Highway District, and in the Snowdown School District, based on assessments by

the State Tax Commission, a situation which puts appellant in an impossible predicament, in its present protest against the statutory system of taxation by the State of Mississippi.

Furthermore, Tishomingo County as a road district, the first supervisor's district of said county as a road district, and the Lee Highway District as a road district, were all organized under Chapter 277, Laws of 1920, or previous statutes, substantially identical therewith, for the purposes of this cause.

The Mississippi system for the organization and operation of road districts appears for the first time in Chapter 149, Laws of Mississippi of 1910.

Such original statutory system was amended thereafter by Chapter 176, Laws of Mississippi of 1914.

The first bond issue in Tishomingo County was by the first supervisor's district thereof for $35,000.00 on the 15th day of December, 1911 (Rec., p. 117).

Such bond issue was under the Laws of 1910.

Counsel for appellant, in their brief, inform the Court that the Memphis & Charleston Railway Company pays 62 per cent of the entire tax in the Oldham Road District, but that the Allen Stone and Gravel Company and the Memphis Stone and Gravel Company, "obviously the most largely benefited taxpayers in the district," pay only 8 per cent each of the tax (Rec., p. 100).

The difficulty about this proposition is that counsel did not testify as witnesses in the case. No testimony

either shows or tends to indicate that said corporations are the chief beneficiaries of the improved system of roads in the Oldham District.

The record of course shows that both of those gravel pits do an enormous volume of business; but every ton of their product goes out over appellant's line of railroad, without competition.

No witness in the case testifies that either the Allen Company or the Memphis Company has escaped taxation on any of its assets, real or personal.

Mr. D. F. Rice, division superintendent of the Mobile & Ohio Railroad Company, an affiliated corporation with appellant, testifies that the local passenger traffic of the Memphis & Charleston Railway Company, and other railroads for that matter, has been reduced by "hard-surface roads running parallel with the railroad."

Certainly.

However, it is equally certain that the vast volume of business accruing to the railroad companies from the transportation of automobiles, automobile parts, oil, gasoline, and other commodities of these modern activities, is a source of revenue absolutely without precedent in railroad history.

The official records of the Interstate Commerce Commission will conclusively demonstrate that, notwithstanding reduced local passenger traffic, the railroad companies of this country enjoyed, during the year 1929, the most wonderful prosperity within the past decade.

Mr. W. H. Foreline, train master for the same Mobile & Ohio Railroad Company, also testified to reduced local passenger traffic as the result of hard-surface roads; but this witness was compelled to admit that railroad prosperity inevitably follows the development of railroad territory.

The great railroad companies of this country today are maintaining their agricultural departments, their industrial departments, and perhaps other departments, for the improvement and development of both urban territory and rural territory; but when they are asked to contribute, under a just and equitable system of taxation, to a system of improved roads absolutely essential to their own prosperity, they often resist.

There is only one popular form of taxation in this country, and that is the system which makes the tax fall on someone else.

This witness also, with specific reference to the two gravel pits of the Oldham Road District, was compelled to admit that appellant would be deprived of its large revenue, approximately $250,000.00 per annum gross, if labor conditions in that territory were such as to prevent operation of the pits.

Mr. Foreline admirably illustrates the railroad position; and we quote him:

> "Q. And these automobiles from Henry Ford and Buick and other concerns, they are shipped in here

by rail from the various factories, from Detroit, Chicago, Ohio and elsewhere?

A. Some are, and some shipped into distributing points and delivered out.

Q. But 99 or 100 per cent of that business comes in from the factories by railroad?

A. I would say so; yes, sir.

Q. We have no great oil refineries or gas plants in Mississippi?

A. No, sir; not yet.

Q. Possibly, from your suggestion, you might own a little stock in the Amory Petroleum Company, together with myself and the Court?

A. I would answer that the same way—not yet.

Q. Well, from the refineries and the gasoline plants, this oil, gas, grease and other commodities going into the operation of this enormous automobile traffic of our country, for business and for pleasure, that is railroad business, ordinarily comes in by train?

A. As a general proposition, we move it in bulk.

Q. As a railroad man, you have given in your judgment for the complainant. Do you believe the hard-surface roads and development of the country, including this automobile proposition, including gaso- [fol. 140] line and oil, grease and parts of automobiles, you think that development of the country under those circumstances is increasing or decreasing railroad business and population?

A. Increasing it.

Q. If it was in your power as representatives of the railroad company, to eliminate this development of the country, hard-surface roads, including automobile competition, also taking into consideration the automobile business, oil, gasoline, etc., that goes to the

railroad company, and also taking into further consideration the advantage of lateral roads that bring in cotton and other commodities to the railroad, would you believe that would be good business or bad business?

A. I don't think the development should be eliminated; I think the competition should be eliminated; I don't think the development of the country should be hindered any way.

Q. You think we should have all these developments and hard-surface roads, but no transportation should be over these hard roads in competition with the railroad companies?

A. In a measure, that is what I mean; yes, sir.

Q. In other words, you mean the national and state highways simply should be for pleasure cars and not for traffic?

A. In competition, I should say not.

Q. In other words, it is all right to use a Lincoln sedan on a national or state highway, but not right to use a truck in competition with railroads to haul commodities for consumption?

A. I don't think it is right.

Q. In other words, just to be perfectly clear, the Lincoln sedan would be all right but the truck would not be right?

[fol. 141] A. The Lincoln sedan used as a pleasure car would be all right.

Q. But the truck-hauling car wouldn't be all right?

A. The truck and busses wear out the roads, which we have labored for and paid for, and all wrong" (Rec., pp. 103-4).

A Lincoln sedan is all right, but a Ford truck is all wrong, according to appellant's contention through its witnesses in this case, or in other words, under this record, appellant and its affiliated corporations are in favor of a national and state system of highways, but demand the right to exclude therefrom all motor vehicles for business purposes, including the transportation of commodities which could otherwise be shipped as railroad freight.

Appellant introduced as a witness Joe White, freight agent at Corinth, Mississippi, some thirty or forty miles west of the Oldham Road District, in order that he might tell what he knew about the issues involved in this suit; but appellant was exceedingly careful not to introduce its agent at Iuka, Mississippi, through which office all shipments were made out of the Oldham District, including its gravel pits.

Mr. White had a full statement of freight business from Corinth, Mississippi, to other points east of there, including Iuka, Mississippi, on a comparative basis as between 1923 and 1927; but appellant was exceedingly careful to avoid in this record by any possible peradventure any similar exhibit or statement of its business from Iuka, Misissippi, originating in the Oldham Road District.

With reference to the vital issues in this case, appellant introduced five witnesses, and five witnesses only, as follows, to wit:

E. S. Davis (Rec., p. 68).
T. C. Blackwell (Rec., p. 84).
D. F. Rice (Rec., p. 93).
W. H. Foreline (Rec., p. 99).
Joe White (Rec., p. 105).

None of these witnesses had any personal knowledge of conditions in the Oldham Road District either before or after the organization thereof. None of them introduced any exhibits or records comparative or otherwise showing the results accruing to appellant in its revenues at Iuka, Mississippi, shipping point for said district, or rather its billing point.

Appellant in its brief undertakes to demonstrate as a matter of mathematics that discrimination in taxation results from the statutory system in the State of Mississippi by which the local authorities of a county assess its real estate and personal property, while the State Tax Commission assesses all public service corporations.

Appellant says:

> "The very fact that in this case the assessments were made by entirely different assessing authorities conclusively, we submit, shows in and of itself discrimination, in view of the legislative adoption of such bases."

What does all of this phraseology mean?

It means just simply this, viz., that appellant condemns all taxation in Mississippi and in every other state where

public service corporations, including railroad companies, are subject to assessment by a commission or board representing the state.

Under any other system, the Board of Supervisors of every county in the state would be required to assess such public service corporation, including railroad companies, on their assets, mileage or trackage in every county, respectively.

One county could assess the trackage within its territory at $10,000.00 per mile, and the adjoining county could assess it $20,000.00 per mile, or $40,000.00 per mile, or some other amount.

Reason and common sense condemn any theory such as appellant suggests in its brief.

Furthermore, appellant has itself accepted and acquiesced in the statutory system of taxation in the State of Mississippi, paying taxes thereunder, both state and county taxes in Tishomingo County, road taxes in the Lee Highway District and school taxes in the Snowdown School District.

Appellant has therefore accepted and acquiesced in the validity and constitutionality of the statutes of Mississippi until the organization of the Oldham Road District on the 4th day of February, 1926, and, in fact, until its bill was filed herein on the 13th day of May, 1927.

Appellant therefore protests on this appeal to the Supreme Court of the United States against the statutory method for the assessment and taxation of public serv-

ice corporations by the State of Mississippi, and also against the constitutionality of the road system of said state under its statutes, although it had accepted and acquiesced in all of such statutes under this record for at least sixteen years before this instant litigation.

Appellant could have attacked the constitutionality of the road system and statutes of Mississippi under the bond issue of Tishomingo County for $300,000.00 or under other districts in Tishomingo County, Alcorn County or other counties across the State of Mississippi, from Alabama to the Tennessee line, districts involving large bond issues, but for reasons of its own appellant selected for its attack on the constitutionality of the road system of Mississippi this small district in Tishomingo County involving a bond issue for the modest sum of $6,500.00 only.

Appellant's motive in the selection of this small district for such attack is more or less obscure, perhaps a purpose to secure adjudication on a comparatively small district involving a small bond issue where active opposition might possibly be avoided.

In any event, appellant, while selecting a small district, selected a district of vital importance to the Southern Railway System, including the Memphis & Charleston Railway Company.

Taxation, for instance, in the Oldham Road District under the bond issue involved in this litigation would amount to the approximate sum of $1,800.00 against appellant in four years time, while the gross railroad revenues of such

district for the same period of time would be approximately $1,000,000.00.

The logic of this situation on its facts is so evident that we submit our cause to the Court's consideration with all confidence.

By every principle of equity and right appellant, under the facts and under the law of this case, should be required to pay its proportionate taxes for the road system of the Oldham District.

ANALYSIS OF AUTHORITIES CITED BY APPELLANT.

In the alphabetical order in which its authorities appear in the index to appellant's brief, we briefly consider these cases, as follows:

Atchison, T. & S. F. Ry. Co. v. Anderson County, 120 Kan. 240, 243 Pac. 282.

The holding in this case is that the correct method of taxation in a special benefit district is according to benefits, and that no other method (for example, the ad valorem method) should be adopted. The converse of this principle is equally sound, that in an ad valorem district the method of taxation should be ad valorem, and not, as contended by appellant, according to benefits to lands only.

Branson v. Bush, 251 U. S. 182.

In this case a special benefit road district had been created under a special act of the Arkansas Legislature, which not only created the district, but prescribed its boundaries. Aside from the main fact that this was a special benefit district and not an ad valorem district, there are two things in the opinion, which, as applied to the present case, are significant. At page 188 the Court said that the Fourteenth Amendment "was not intended to compel the state to adopt an iron rule of equal taxation." And at page 191, this, namely, that "To this must be added the obvious fact that anything that develops the territory which a railroad serves

must necessarily be of benefit to it, and that no agency for such development equals that of good roads." And this Court, by its judgment, reversed the Circuit Court of Appeals, which had itself reversed the decree of the District Court sustaining the tax on real estate.

Browning v. Hooper, 269 U. S. 396.

This case is discussed at length in the body of our brief.

Chicago, R. I. & P. Ry., In re, 28 Fed. (2d) 56.

This is a decision of the District Judge of the First Division of the United States District Court of Kansas. The local improvement district involved was a drainage district organized under a statute which provided, among other things, "that all * * * taxes * * * shall be levied * * * in proportion to the benefits derived * * *." It also provided for the appointment of a benefits and damages commission, whose duty it was "to assess the cost of improvements made against the land and other real property in proportion to the benefits derived therefrom." The Commission, however, assessed benefits, not according to this method, but according to assessed values. No such parallel exists in the case at bar.

Embree v. Kansas City Road District, 240 U. S. 242.

This case arose as to a special benefit road district, and not an ad valorem district. The Supreme Court of Missouri, under whose statutes the district had been organized, had construed that statute, and this Court followed the

Supreme Court of that state in so far as the former had spoken. But we do not see the applicability of that case in the present connection, because, first, the district was based entirely on special benefits, and not upon ad valorem taxation; and, secondly, nothing arbitrary was shown, nor was there any abuse of power. And this Court, speaking through Mr. Justice Van Devanter, said:

> "A legislative act of this nature can be successfully called in question only when it is so devoid of any reasonable basis as to be essentially arbitrary and an abuse of power" (citing cases) (pp. 250-251).

French v. Barber Asphalt Paving Company, 181 U. S. 324.

In this case a judgment of the Supreme Court of Missouri was affirmed in a suit instituted by a paving company on a special tax bill issued for the paving of a street in Kansas City. The district was distinctly a local benefit assessment district to pay the cost of street paving, and was in no sense similar to an ad valorem road district such as the Oldham District of Tishomingo County, Mississippi. No further comment would seem to be necessary. One significant thing in this case, however, is that it was held by this Court, in substance, that it was not the intention of the Fourteenth Amendment to subvert the systems of the state pertaining to general and special taxation.

Gast Realty & Investment Co. v. Schneider Granite Co., 240 U. S. 55.

This also was a suit to collect a tax for paving a street in St. Louis, under a city charter which provided that one-fourth of the total cost should be levied upon all the property fronting upon or adjoining the improvement according to frontage, and three-fourths, according to area, upon all the property in the district, ascertained according to rules specifically set out. It will be observed that this was in no sense an ad valorem district, but purely and simply a special benefit assessment district. The evidence established that there were gross inequalities and differences in the assessments laid upon different properties, because the city ordinance, following the mechanical charter rule, established a line determining the proportion in which the tax was to be borne that, after running less than one hundred feet from the street, leaped to nearly five hundred feet, and on the opposite side of the street was one hundred and fifty and two hundred and forty feet away. These differences were not based upon any consideration of differences in the benefits conferred. The case was not merely an incidental result of a rule which on the average works well, but, in the language of Mr. Justice Holmes, "of an ordinance that is a farrago of irrational irregularities throughout." We respectfully submit that no such condition exists in the case now at bar. The Oldham Road District of Tishomingo County, Mississippi, is an ad valorem district. If its taxes are subject to the

criticism so justly leveled against the street paving system of St. Louis, then the whole of the ad valorem tax system of the State of Mississippi is being assailed in this case.

Hesse-Rix Co. v. Krug, 319 Mo. 880, 6 S. W. (2d) 570.

This was an action on special tax bills for street paving in the City of St. Joseph, Missouri. And here again the district was one based upon special benefits only, and not upon ad valorem taxation. But the city engineer laying out the district had followed a blind mechanical rule which he conceived to be directed by the state statute, without regard to, or any consideration of, the special benefits accruing to each of the several tracts of land by reason of the paving improvements (p. 887).

We respectfully submit that none of these special tax bill cases are in point.

Houck v. Little River Drainage District, 239 U. S. 254.

This case originated under a Missouri statute providing for the organization of drainage districts, and was a suit to restrain the collection of a fixed tax of 25 cents per acre levied upon all lands in the district to pay preliminary expenses. The district was, of course, a special benefit assessment district, and not an ad valorem district. The question presented on the record was in no sense similar to any of the questions now before the Court, but some of the language used in the opinion of Mr. Justice Hughes may be helpful. For example, at page 262, we find this language:

"In view of the nature of this enterprise, it is observed that, so far as the Federal Constitution is concerned, the state might have defrayed the entire expense out of state funds raised by general taxation, or it could have apportioned the burden among the counties in which the lands were situated and the improvements were to be made (The County of Mobile v. Kimball, 102 U. S. 691, 703, 704). It was equally within the power of the state to create tax districts to meet the authorized outlays. The Legislature, unless restricted by the State Constitution, can create such districts directly, or, as in this case, it may provide for their institution through a proceeding in the court in which the parties interested are cited to appear and present their objections, if any. The propriety of a delegation of this sort was a question for the state alone."

Illinois Central Railroad Co. v. Decatur, 147 U. S. 190.

The question there involved was whether an act of the State of Illinois, incorporating the railroad and exempting it from taxation, would also exempt it from the payment of a municipal assessment laid for the purpose of grading and paving a street. We do not see how the decision in that case constitutes any precedent for the result contended for by the appellant in the instant case.

Kansas City Southern Railway Co. v. May, 2 Fed (2d) 680.

This was a case which originated in the District Court of the United States for the Western District of Arkansas, in which it was sought by injunction to have certain

assessments against a railroad declared void. The district was a special assessment benefit district. But the important fact in the case, and the one upon which the decision of the Court of Appeals turned, was that officials of the district had been guilty of a deliberate fraud in agreeing to lower the assessment of benefits against the railroad to a certain percentage of the total, and afterwards lowering the assessments on the owners of other property in the district so that the proportion of the burden resting upon the railroad was unchanged. On account of this deliberate fraud the contentions of the railroad were sustained, but both the opinion and the judgment took care to protect the rights of the holders of the outstanding bonds of the district.

Kansas City Southern Railway v. Ogden Levee District, 15 Fed. (2d) 637.

A levee district was organized by the Legislature of Arkansas by a special act. It was not an ad valorem district. Here the ruling of the Court of Appeals did not result in destroying the legality of a bond issue, nor the organization of the district, but merely resulted in correcting an inequality which originated in the peculiar facts of the case, palpably arbitrary and discriminatory, and therefore violative of the Fourteenth Amendment.

Kansas City Southern R. Co. v. Road Imp. Dist. No. 3, 266 U. S. 379.

This case is doubtless cited by appellant for the abstract proposition that it is only where there is manifest and un-

reasonable discrimination in fixing benefits that a legislative determination can be said to contravene the equal protection clause of the Constitution. Because it was there held, among other things, that, in the case of a railroad, benefits may consist of gains from increased traffic reasonably expected to result from the improvement. The district was a special benefit assessment district. And the holding was that the objections made to the assessment on constitutional grounds were not well taken.

Kansas City Southern R. Co. v. Road Imp. Dist. No. 6, 256 U. S. 658.

This also was a special assessment district where the assessments were to be based upon benefits. But it was also a district where, under the statute, a duly-appointed board divided the lands in the district into five zones, ascertaining benefits according to a fixed proportion of values in the different zones. The railroad's property in the district was, however, assessed according to a different principle, which resulted in the gross discrimination which occasioned the reversal of the judgment below. In other words, two different methods of ascertaining benefits were adopted. This Court, however, in speaking of the general rule that a state legislature may create taxing districts, said: "Ordinarily, the levy may be upon lands specially benefited according to value, position, area, or the front-foot rule" (page 660, citing cases).

We would remark that the instant case is not a special benefit district, but if it were, then the Legislature of

Mississippi could have provided that the assessments could be levied upon the lands specially benefited according to value, or according to either of the other methods pointed out by this Court. Even, therefore, on the assumption of the appellant that the Oldham Road District is a special benefit district, its argument, we respectfully submit, falls to the ground.

Louisville Gas & E. Company v. Coleman, 277 U. S. 32.

This case had nothing to do with special taxing districts. It arose on a statute of Kentucky which required the payment of a tax upon the recording of mortgages not maturing within five years but exempting mortgages maturing within that period. No further comment is necessary.

Memphis & Charleston Railway Company v. Bullen.

This is the case now at bar.

Missouri Pacific R. Co. v. Mitchell County, 110 Kansas 582, 204 Pac. 729.

This is another special assessment benefit district where the benefits were ascertained according to zones. A reading of the decision shows that the facts are radically different from those of the case at bar; and that the principles of law which were there invoked and applied were those appropriate to a special benefit district, but not to an ad valorem district.

Missouri Pacific Railroad Company v. Road Improvement Dist., 288 Fed. 502.

This was a decision by the Circuit Court of Appeals of the Eighth Circuit. The District was a local assessment benefit district created by a legislative act of Arkansas. It was not an ad valorem district. A reading of the Court's opinion discloses the fact that it was largely because this was a local assessment district that the discrimination appeared so glaring, and because the legislative act seemed to carry the intention that it should be real estate that was to be assessed for the benefits which the Commissioners might find would accrue to it, and because the railroad's property had been assessed to at least 60 per cent of its value, while other property in the district had been assessed much lower, farm lands at not exceeding 15 per cent to 25 per cent. In other words, there was actual discrimination against the railroad in the all-important matter of the ascertainment of benefits. No such showing has been made in the present case, as to the ad valorem assessments made by the State of Mississippi against the Memphis & Charleston Railroad.

Missouri Pacific Railroad Company v. Western Crawford Road District, 266 U. S. 187.

This was another Arkansas special benefit improvement district created by a special act of the State Legislature. We are at a loss to understand why the case is cited by appellant, because this Court there held that a state may

defray the cost of constructing a highway, in whole or in part, by means of special assessments upon property specially benefited thereby, but that it is not obliged to do so; that road building is a public purpose which may be effected by general taxation, and that the cost may be defrayed out of state funds, or a taxing district may be created to meet the authorized outlay, and that "the Fourteenth Amendment does not require that taxes laid for this purpose shall be according to the benefits to be received by the person or thing taxed" (p. 190). And the opinion ends with the statement that there was no suggestion of that flagrant abuse or purely arbitrary exercise of the taxing power against which the Federal Constitution affords protection.

Myles Salt Company v. Iberia Drainage District, 239 U. S. 478.

This was a Louisiana drainage district, organized by a police jury under a general statute of the state. But the complainant's land rose so high above the lands that were to be benefited that they could in no way be benefited themselves, and this action was held to have been palpably arbitrary. We need only remark that that is not this case.

Prather v. Googe, 108 Miss. 670.

This case is discussed elsewhere in this brief.

Quaker City Cab Company v. Pennsylvania, 277 U. S. 389.

This is another case which does not involve the taxation,

or the methods of taxation, in a road district. The tax complained of was a state tax laid against a cab company.

Road Improvement District No. 1 v. Missouri Pacific R. Co., 274 U. S. 188.

This was a special assessment district where benefits accruing to the railroad were based, not only on its real estate, but also on its rolling stock and other personal property; whereas benefits to other property were levied against real estate only. That is to say, the railroad was the only taxpayer against whom benefits were assessed in this peculiar manner. There were concurrent findings of two courts below of facts showing the assessment to be arbitrary and unreasonably discriminatory; and these were accepted by this Court, they not being clearly erroneous. The case is distinguished from the case now at bar because this is an ad valorem district and no question as to the method of ascertaining special benefits is involved. Furthermore, there have been two findings of courts below (the state courts) which sustained the general ad valorem tax against the railroad.

St. Louis & Southwestern Railway Co. v. Nattin, 277 U. S. 157.

This case is discussed at length in other parts of this brief.

Spencer v. Merchant, 125 U. S. 345.

The subject matter of this case was a street assessment in New York. It was held that the assessment under the

statute was not a taking of property without due process of law in violation of the Fourteenth Amendment.

Standard Pipe Line Co. v. Highway District, 277 U. S. 160.

Here a road constructed in a special assessment district cost less than $9,000 per mile. An interstate oil-pipe line which traversed the district was assessed for benefits at $5,000 per mile. The ruling was that while the pipe line may have received some small benefit from road improvements, the assessment actually made was arbitrary and unreasonable in amount. The situation, however, of the Memphis & Charleston Railroad as regards the Oldham Road District is a very different matter. Its tax is approximately $450.00 per year; whereas its annual revenue originating in the district is approximately $250,000.

Thomas v. Kansas City Southern Railway, 261 U. S. 481.

This was a drainage district of Arkansas. The railroad was not assessed for benefits according to the same method as other property in the district. In the case at bar, however, only one method, ad valorem, has been resorted to.

Valley Farms v. County of Westchester, 261 U. S. 155.

The tax involved here was for the construction and operation of a sewer. The tax was based on special bene-

fits, and was not ad valorem in character. The judgment of the Court below was affirmed.

CONCLUSION.

On all of the facts, as well as upon the principles laid down in the adjudicated cases, even those cited by the appellants, the judgment of the Supreme Court of Mississippi should be affirmed.

Respectfully submitted,

JAMES A. CUNNINGHAM,
MAGRUDER, WALKER & MAGRUDER,
W. W. MAGRUDER,
Attorneys for Appellees.

BENJAMIN H. CHARLES,
Of Counsel.

We hereby certify that we have on this day mailed two copies of the within and foregoing brief, postage prepaid, to counsel for appellant at their regular post-office addresses respectively.

To Ely B. Mitchell, Esq., Corinth, Mississippi, and
To Messrs. S. R. Prince and John B. Hyde,
c/o Southern Railway System,
Washington, D. C.

Witness our signatures on this, the 11th day of January, A. D. 1930.

W. W. Magruder,
Benjamin H. Charles.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

NO. 8

MEMPHIS & CHARLESTON RAILWAY CO.,
Appellant,

VS.

C. L. PACE, G. C. STEPHENS, R. C. GRISHAM et al., Appellees.

Appeal from the Supreme Court of the State of Missisippi.

BRIEF OF ATTORNEY GENERAL OF MISSISSIPPI AS AMICUS CURIAE.

GEO. T. MITCHELL,
Attorney-General of Mississippi,
and
J. A. LAUDERDALE,
Assistant Attorney General.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

NO. 8.
(No. 276, October Term, 1929)

MEMPHIS & CHARLESTON RAILWAY CO.,
Appellant,

VS.

C. L. PACE, G. C. STEPHENS, R. C. GRISHAM

Appeal from the Supreme Court of the State of Mississippi.

BRIEF OF ATTORNEY GENERAL OF MISSISSIPPI, AMICUS CURIAE.

May it Please the Court:

The Attorney General of Mississippi has not, until recently, considered it at all necessary to ask to be heard on this appeal. All of the principal phases of the case seem to have been covered by counsel of record. But it has now been brought to our attention that the relatively small tax levied upon the appellant railroad in the Oldham Road Dis-

trict involves interests of vastly greater importance; and inasmuch as the Court has now ordered this case back to the docket for a re-argument, we deem it not inappropriate that the State of Mississippi, acting through its Law Department, should have asked leave of Court to bring to the Court's attention certain matters which are of peculiar interest and importance to the State itself and to its credit.

The amount of the tax shown by the record as falling upon the appellant is but $450 per year. This relatively small amount may not be quite so petty as to bring the case within the principle stated in the maxim, de minimis non curat lex. But it is so small as to make us wonder why the complainant, the appellant, should deem it necessary in the protection of its own interests to jeopardize the credit of one of the sovereign states, and to bring injury and in some cases misery perhaps to thousands of the holders of its public securities.

The few questions which we will discuss are those having to do with estoppel and laches; the abandoment of the case presented in the Mississippi Courts and the substitution therefor of a case not pleaded; a false issue involving a serious charge against the State of Mississippi; a new case (not pleaded) involving a charge that local officials were guilty of actual fraud against the appellant in the laying out of the district; a few comments that the special act which validated this district was not attacked by the bill of complaint; and a short discussion of the facts distinguishing the Legislation of Mississippi from that of

Texas, which was held invalid in *Browning vs. Hooper*, 269 U. S. 396.

BRIEF

I.

Appellant has abandoned the cause pleaded in the bill and now attempts to present a new case. The attack in the Mississippi Courts was directed solely to the point that the Mississippi legislation was void. The abandonment of this position is shown in appellant's "Statement as to Jurisdiction on Appeal," p. 6, as follows:

> "This judgment" (in the Supreme Court of Mississippi) "of the State's highest court foreclosed a review in this court of all technical questions considered below, having to do with the original creation of the special district * * *."

The case now presented is, in effect, that a valid statute has been misapplied by local officials so as fraudently to bring into the district property of the appellant which equitably should have been excluded.

II.

The appellant's case is barred by its laches and delay in the filing of its bill.

(a) More than a year elapsed after the organization of the district before the appellant challenged the tax complained of.

(b) During all that period the district and its officials functioned regularly, issuing its bonds, constructing roads with their proceeds, and levying taxes.

(c) Any objection to a tax should be made promptly, because (1) the functions of government depend upon the collection of taxes. (2) The integrity of bond issues secured by taxes should not be jeopardized by objections coming after undue delay. (3) The rules of law as to laches of individuals do not apply in cases of public corporations levying taxes.

Lyons vs. School District, 311 Mo. 349, 367, 368 l. c.

16 Am. & Eng. Ency. Law (2 Ed.) 363.

Pomeroy's Equitable Remedies (1 Ed.) Sec. 21.

High on Injunction (4 Ed.) Sec. 418, p. 696.

Kennedy vs. Montgomery County, 38 S. W. (Tenn.) 1075.

III.

The special act (Ch. 1080, Laws of Miss. 1926) which validated the organization of the Oldham Road District, was not attacked by the appellants bill of complaint.

IV.

The Mississippi road legislation does not fall in the same class with that of Texas, which was held invalid in *Browning vs. Hooper*, 269 U. S. 396.

Memphis & Charleston Railway Company vs. Bullen, 154 Miss. 536; 121 So. 826;

Opinion of Mississippi Supreme Court, Tr. Rec., pp. 231-237;

St. Louis & Southwestern Railway Company vs. Nattin, 277 U. S. 157;

Hancock vs. Muskogee, 250 U . S. 454;

Valley Farms Co. vs. Weschester County, 261 U. S. 155.

APPELLANT HAS ABANDONED THE ONLY CAUSE PLEADED, AND NOW BRINGS FORWARD A CASE NOT PLEADED.

In the lower courts the appellant's sole attack was against the legislation of Mississippi. It was urged that the tax complained of was void because the act (Ch. 277 of 1920) under which the district was organized and the tax levied was unconstitutional. No other position was taken. All the averments of the bill went to this one allegation, namely, that the Mississippi legislation was void. No point was made, either in the pleadings or briefs, that a fraud had been committed by local authorities in the organization of the district, under a valid act, by so laying out the district as fraudently to draw into it property of the appellant which should have been left out. We repeat that the bill contains no such averment. The appellant has abandoned in this court the position which it took in the Mississippi courts. And it now attempts to take a position not supported by its own bill. An analysis of the bill, nay, even a cursory reading of it, will show that there is no charge whatever of any legislative or official fraud in the laying out of the district intended to accomplish the wicked purpose of drawing into the district, in order to tax, property which equitably and rightly should not be taxed. And it is

a false issue, but one which is interwoven with other argument, to urge that Chapter 277 of the Laws of Mississippi of 1920 actually provides a method for the depriving persons of their property without due process of law. This is a most serious charge against the State of Mississippi, and one which should not be sustained by the highest court in the land, unless a much clearer case should be made than has been made here.

If Chapter 277 is void because it *might* be the means of official injustice, then every statute requiring official action of any kind should be held void; a clear reductio ad absurdum. For, of course, any official or board charged with the exercise of public functions of any kind may be guilty of oppression in office and thereby twist and stretch a valid enactment to tyrannous purposes. But the act remains valid for all that, and in spite of its official misuse in some particular case. And, now, the point here is simply this, that the appellant did not plead, nor did he argue below, that a valid enactment had been thus used to commit a fraud. And therefore it may not now present such a case.

ESTOPPEL

The issue of estoppel which was tendered by the answer is most important to the State of Mississippi; because if the appellant should be successful in its (now abandoned) attack on the validity of the Mississippi road district legislation; or if it should be successful even as to the tax against itself (although the position now taken was not pleaded in its bill); and if the appellant's case be not barred

by its estoppel or laches, then a flood of litigation will ensue, involving scores and perhaps hundreds of other districts similarly situated; districts which have uttered bonds, and where the result in this case will be used to undo the constructive work that has been accomplished throughout the State.

The allegations of the answer as to estoppel and laches will be found at pages 28 and 29 of the transcript of the record. There the substance of the allegations is that the appellant's own conduct and laches in the bringing of this cause (i. e. its delays) are at variance with the position taken by it when it was its duty to speak and when it failed and neglected to speak; that it had all due and proper notice of the organization of the district and of the uttering of its obligations; that it neglected to avail itself of its privilege to appeal the cause from the judgment of the Board of Supervisors of Tishomingo County and allowed the same to be adjudicated and made final, and therein acquiesced; that if it did not actually know of these matters, it was its business to know; and that it was chargeable with knowledge in due course and under ordinary diligence and care; that after the organization of the district its bonds were sold under most unusual and delicate circumstances, namely, at a time when bond issues in Mississippi were being scrutinized because of the then recent decision in Browning vs. Hooper, and when other states were readjusting their obligations, and certain State Legislatures were passing validating acts; that the appellant could not escape knowledge of the passage of the general validating act by the State of Mississippi and of the passage of the special act

which validated the Oldham Road District, an act which took effect on the 11th day of March, 1926; that it had full notice of the legislative acts referred to in the bill; that it, the appellant, acquiesced, raised no protests and no objections, served no notice on the Board of Supervisors of Tishomingo County or on the Commisioners of the Oldham Road District, nor to the general public, that appellant intended to contest the validity of the bonds of the district and the acts of the Board of Supervisors in levying taxes to meet those obligations, but that the appellant stood idly by and allowed the bonds to be sold to innocent purchasers for value, and to be put on the market at par, and also stood by and saw the funds received as the proceeds of the bond sale expended in and upon the roads in the district.

The appellant could have been heard by the local administrative court, the Board of Supervisors of the County, had it so desired, at the time of the organization of the district.

It could have appealed from the action of the Board of Supervisors and lodged the matter in the courts of law.

Hemmingway's Annotated Mississippi Code, 1927, Section 60.

The District was organized by proceedings had before the Board of Supervisors of Tishomingo County in January and February, 1926. (Tr. of Rec., p. 47). The appellant took no steps to contest either the organization of the district or the levying of taxes therein, nor the issuance of its bonds, until May 14, 1927, the day when the bill of

complaint was filed. In the meantime the appellant had knowledge, actual or constructive, of the proceedings before the Board of Supervisors, and of the passage by the Legislature of the general validating act of 1926, namely, Chapter 278; knowledge also, actual or constructive, of the passage by the Legislature of the special act for the validation of this particular district (Chapter 1080 of 1926), its organization, its bonds, its tax levies, and its continued existence; and that this act became effective March 11, 1926. Still the bonds of the district were not sold and delivered to a purchaser for a matter of about two months, namely, until May 19, 1926. (Tr. Rec. p. 179). During these two months the appellant could have moved by bill in equity or otherwise to prevent the issuance of the bonds of an allegedly void district; but it was nearly a year after the bonds were delivered and sold before the bill of complaint was filed. (Tr. Rec. pp. 1 to 17, incl.)

In the meantime, namely on or before the first Monday in April, it had become the statutory duty of the appellant railroad company to file with the State Tax Commission a complete schedule, under oath, of all of its property, real or personal, setting forth its mileage, switches, etc., in "each county of the State and in each city * * * road district * * *" (Tr. Rec. p. 152-153). If, therefore, appellant complied with the requirement of this statute (2 Hem. Code of 1927, Sec. 9369), it then had actual knowledge of the existence of this road district, or surely local and state authorities would have imposed the penalty for failure to file the schedule, as provided in Section 9370, Hemingway's Code of 1927, Vol. 2 (Tr. Rec. p. 154). And if appellant felt

that it had any cause of complaint, it could have moved to prevent the sale and delivery of the bonds of the district, which did not occur until about seven weeks after the first of April.

As a matter of fact, the record discloses that on June 2, 1926, the State Tax Commission addressed a communication to the appellant, enclosing descriptions of certain road and school districts, and requesting the railroad, if it had property in the district, to let the Commission know about when the assessment covering the same could be furnished. On July 23, 1926, the railroad's Tax Commissioner addressed the Secretary of the State Tax Commission, in response to the said letter of the latter dated June 2nd, and with this response of July 23rd the railroad forwarded a "statement of this company's property in Oldham Road District, Tishomingo County, Mississippi, as of February 1, 1926." (Tr. Rec. pp. 128 to 130 incl.)

In the meantime the bonds of the district had been disposed of, on May 19, 1926, but the proceeds had not been disbursed in the construction of roads in the district. And, therefore, if at the time when the appellant, for all practical purposes, recognized, or acquiesced in, the existence of the district, by its response of July 23rd to the State Tax Commission, it could, and should, have then and there made its objections and taken proper legal steps to prevent the expenditure of the funds derived from the sale of the bonds until after their legality might have been determined. The appellant, however, did nothing, and so far as this record goes seems never to have called upon either the Commis-

sioners (the governing body) of the District, or the Board of Supervisors of the County, the taxing authority of the district, under whose order the bonds had been issued, to desist from further activities in the district. The appellant made its return of taxable property located in this road district on July 23, 1926. It seems to have done nothing whatsoever by way of objecting to the existence of the district for more than nine months thereafter.

It is inconceivable that the vigilant officials of a great railroad system were not fully advised of all proceedings that were being had in one of the counties through which its line runs, from their very inception, namely, in January, or at least in February, 1926. It is inconceivable that its legislative agents could not have known, and did not know, of the activities going on in the Legislature in February and March, 1926. It is inconceivable that its tax agents did not know of the existence of this district prior to April, 1926, when it became their duty to make return to the State Tax Commission of schedules of the appellant's property lying in each road district. But if, perchance, the existence of this district really did escape the knowledge of all of the officials of the appellant railroad, the record shows quite clearly that they had actual knowledge in June, 1926, when they received the request of June 2 of the State Tax Commission for a return of property in this Oldham Road District. And certainly from that time forward, if not before, it was the duty of appellant promptly to act to prevent loss and injury to others, as well as to protect its own rights. And if any of its property rights were being infringed upon, it was its duty to act in the assertion

thereof, before the rights of innocent third parties had come into being. It could have filed this bill, have made the Treasurer of the District a party, and could have moved to impound the proceeds of the sale of the bonds of the district, and thereby held matters in abeyance until its rights were determined. By its failure to take such reasonable steps for the protection of others it has waived any rights that it ever might have had to contest the validity of said bonds, or to contest the legality of the organization of the district, or the tax levied or to be levied for their payment. By not proceeding promptly and by delaying action for the relatively long period of nine or ten months, until May 14, 1927, the appellant acquiesced in all the prior proceedings.

That the proceeds of the sale of the bonds were still on hand during all this period, that is, until after July, 1926, is evidenced by the facts shown at page 56 et seq. of the transcript of the record, where it appears that the roads to be improved in this district were not decided upon until after June 9, 1926; that two of the Commissioners of the district previously appointed were removed by order of the Board of Supervisors of the County on said June 9th; that thereupon two other persons were appointed to serve as road commissioners for the Oldham Road District (Tr. Rec. p. 58); and that the Board of Commissioners did not ask permission of the Board of Supervisors to go forward with the work of road construction until July 15th. The record does not disclose the date when the first disbursement of funds for road construction in this district was made, but it could not have been until after said July 15, 1926.

We respectfully submit that the appellant is estopped and its alleged cause of action is barred by its own laches or acquiescence.

There is no hard and fast rule to the period of time within which objections to a tax should be made, and beyond which an action to contest the validity of the tax will be barred by laches.

Objection to a tax should be made promptly, because (a) the functions of government depend upon the collection of taxes; (b) the integrity of bond issues or other public securities issued on the security of taxes must not be jeopardized by objections which come after undue delay; and (c) the rules of law as to laches of individuals or private corporations are not to be applied in cases of public corporations levying taxes.

Lyons vs. School District, 311 Mo. 349, 367, 368 l. c. 16 Am. & Eng. Ency. Law (2 Ed.) 363.

In Lyons vs. School District, 311 Mo. 349, a taxpayer sought to enjoin a certain school tax in excess of a limit fixed by the State Constitution; but partly for interest on bonded indebtedness and partly for building and repairs. The tax for building and repairs was voted at an election held in April. Subsequently it was certified by school officials to the Clerk of the County Court charges with the duty of extending the tax. Contracts were made on the strength of these anticipated taxes and the effect of an injunction against the tax would have been to render these contracts invalid and jeopardize the integrity of a bond is-

sue. The Supreme Court of Missouri sustained a demurrer to the bill and denied injunctive relief, and in passing upon the case used this language (l. c. 367, 368):

> "In the period after the voting a levy of taxes, and upon the credit thereof, contracts are made in anticipation of the opening and the necessary maintenance of the schools. It is apparent that at the time the suit was filed a considerable part of the taxes must have been paid, and before the time of its determination the greater portion would be paid. It is true, as urged by counsel for plaintiff, that injunction is a proper remedy to enjoin the collection of taxes levied in excess of the rates allowed by the Constitution, or without authority of law. But, there are other conditions precedent to the proper exercise of such a remedy. In such cases the injury to the complaining party must appear to be substantial, and not disproportionate to the relief sought or to the loss and inconvenience of others and of the public, and the application for the remedy must be seasonably made in view of all the conditions. Counsel cite authorities for the contention that before a court can sustain a demurrer on the ground of laches, the petition must disclose upon its face that the defendant was prejudiced, or put to some disadvantage by the delay, and also that it must appear the plaintiff had knowledge, during the delay, of the facts and of his rights. The cases cited upon this point are cases dealing with private controversies, with facts arising out of the acts of private persons, and not in matters involving the exercise by a public corporation or public quasi-corporation, of the powers of taxation and expenditure of public moneys, accord-

ing to the statutory and constitutional provisions, begun upon notice to the public, taking form at stated times prescribed by law, and involving matters of interest to all that part of the public within a given district. The acts set out in the petition are the acts of public officials affecting all members of the corporate community, of which plaintiff was also a member.

Not only is the question of what constitutes laches in a given case, a question for the exercise of a sound discretion by the court, but the property of the issuance of an injunction in a given case is also a matter wherein a sound discretion is to be exercised. This rule is well stated in *Tanner vs. Lindell Railway Co.*, 180 Mo. 18. There, it is said: 'But the issuance of an injunction even when promptly applied for is always in the sound judicial discretion of the court. The courts will require a very strong case for the granting of an injunction which will cause more injury than it will remedy, and it may be said, as a general rule, that an injunction will not be granted when it will be productive of greater injury than will result from a refusal of it. This rule is especially applicable when the party applying for an injunction has by his own laches made it impossible to grant the injunction without inflicting serious injury on the party so to be enjoined. In determining which way the balance of convenience lies, the resultant benefit and detriment to the parties litigant are not the only matters to be considered. The court will also consider the injuries which may be inflicted on strangers to the suit and to the public generally.' (16 Am. & Eng. Ency. Law (2 Ed. 363.). That doctrine was announced by this court in *Bailey vs. Culver*, 84 Mo. 540."

And in such cases as this, and especially after the delay of more than a year from the time when the bond tax was levied by the Board of Supervisors, and nearly a year after appellant's officers had actual knowledge of the existence of the tax, it is absolutely essential to the complainant's case that it should have pleaded any facts which might have tended to excuse its delay in taking action against the tax.

Pomeroy's Equitable Remedies (1 Ed.) Sec. 21.

High on Injunction (4 Ed.) Sec. 418, p. 696.

Lyons vs. School District, 311 Mo. 349.

Kennedy vs. Montgomery County, 38 S. W. (Tenn.) 1075.

And the case being otherwise, complainant (appellant) should be denied relief.

THE SPECIAL VALIDATING ACT (CH. 1080, 1926) WAS NOT ATTACKED BY THE BILL.

Even if there could have been any sound argument urged against the validity of the legislation under which this district was organized; and even if its organization might have been questioned, all possible irregularity and invalidity have been wiped out by the enactment, in 1926, of Chapter 1080 of the Laws of Mississippi for that year. This is the special validating act similar in character to several hundred others enacted at the same session for the same purpose, and wherein and whereby the Legislature of Mississippi undertook to set at rest any doubt as to the attitude of the State itself with respect to such a district as this.

Memphis & Charlston Ry. Co. vs. Bullen, 154 Miss. 536; 121 So. 826; Tr. of Rec. pp. 231-247.

The State, acting through its legislative department, proclaimed to the world that whatever the Oldham Road District might otherwise have been, it should then and from thenceforth be known as a taxing district, whose organization was validated and vouched for and continued by the Legislature itself, and whose bonds and other obligations should not be questioned.

It is significant that while the prayer of the bill asks the courts to hold that certain acts of Mississippi are unstitutional, there was no such prayer as to this Chapter 1080 of 1926. It is also significant that there was no allegation in the bill that this act was unconstitutional. And the allegation of the answer is correct, that this act "makes and constitutes the Oldham Road District and all the obligations and undertakings incurred by the terms and conditions of said bonds the creature and the act of the Legislature of the State of Mississippi, and gives it a permanent status as such." (Tr. of Rec., pp. 29 and 30.)

THE MISSISSIPPI ROAD DISTRICT ACT (CH. 277 OF 1920) IS IN NO WAY SIMILAR TO THE TEXAS DISTRICT WHICH WAS CONDEMNED IN

Browning vs. Hooper, 269 U. S. 396; 70 L. Ed. 330.

We find that this case has been cited and so fully discussed by briefs of opposing counsel that perhaps the Law Department of the State should not take the time of the

Court by further discussion. But we wish to add one or two things, and, among others, that the State is most vitally interested in repelling the charge and meeting the argument of appellant, that the State's legislation with respect to road districts is subject to the same condemnation which was leveled against the road district legislation of Texas. The statutes of the two states were and are radically different from each other. Those differences have been pointed out in the brief of the appellees, and we shall now do no more than to recapitulate:

1. In the Texas case the petitioners for the organization of the district decided upon the location of a single road. Under the Mississippi statute the petitioners had no such right or authority, and in the present case the two roads which at the time when this case was tried in the Chancery Court had been constructed, had however not been selected until some four or five months after the organization of the district, and after the appointment of road commissioners, and after the approval of the Board of Supervisors. (Tr. Rec. pp. 56 and 57).

2. The Texas statute conferred no authority upon the local court (County Commissioners' Court) to refuse to establish the district. In Mississippi, the Board of Supervisors exercises its discretion in the matter of sustaining or denying the petition.

Prather vs. Googe, 108 Miss. 670; 67 So. 156.

Memphis & Charleston vs. Bullen, 154 Miss. 536; 121 So. 826. (Tr. Rec. pp. 231-247).

3. The Texas statute was held, in *Browning vs. Hooper*, supra, as authorizing the creation by the local court of a local improvement special assessment type of district. The Mississippi statute, Chapter 277 of 1920, provides for the organization of ad valorem districts only.

4. The Texas statute sought to impose on lands in the district "special assessments for local improvements;" while the Mississippi statute provides for district taxes to be levied ad valorem on every kind and character of property subject to taxation.

5. Under the Texas statute road districts were not created by the Legislature, nor was there any delegation of legislative authority. In Mississippi the Legislature has delegated to the Board of Supervisors of any county the discretionary power to organize such a district, which, when thus created, becomes a municipality, to which the State has granted full legislative powers, subject to the approval of the Board of Supervisors.

(See Ch. 277, Laws of Miss. 1920, Tr. Rec., pp. 139 et seq.)

St. Louis & Southwestern Railway Company vs. E. H. Nattin, Tax Collector, 277 U. S. 157.

Hancock vs. Muskogee, 250 U. S. 454;

Valley Farms Co. vs. Westchester County, 261 U. S. 155.

6. The Mississippi road district legislation is, as above stated, radically different from the road legislation of

Texas, condemned in *Browning vs. Hooper*, and is more nearly like that of Louisiana, which this Court sustained in *St. Louis & Southwestern Railway Company vs. Nattin*, 277 U. S. 157.

Respectfully submitted,

GEO. T. MITCHELL,
Attorney General, and

J. A. LAUDERDALE,
Assistant Attorney General.
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 8.—October Term, 1930.

Memphis & Charleston Railway Company, Appellant, *vs.* C. L. Pace, et al. } Appeal from the Supreme Court of the State of Mississippi.

[January 5, 1931.]

Mr. Justice Van Devanter delivered the opinion of the Court.

By a suit in equity brought in the chancery court of Tishomingo County, Mississippi, the appellant sought an injunction forbidding the collection of a tax levied to make a partial payment upon bonds of the Oldham road district in that county. Among other grounds for such relief the bill assailed the state statutes underlying the existence of the district and the levy of the tax as being invalid under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. After answer and a hearing the chancery court entered a decree for the defendants, which the Supreme Court of the State affirmed. 154 Miss. 536. An appeal brings the case here.

The road district was created, and commissioners therefor were appointed, by the board of supervisors of the county in February, 1926, under chapter 277 of the state laws of 1920. With an approving vote of the district's electors, and at the request of the commissioners, the board of supervisors then issued and sold bonds of the district in the sum of $6,500 to provide money for the construction and maintenance of public roads in the district—the particular roads to be determined later on as provided in section 5 of chapter 277.

At this stage of the proceedings the state legislature, desiring to put at rest any question respecting the validity of the creation of the district and the issue of the bonds, passed two acts confirming both. One of these acts took effect on March 11, 1926, and the other four days later. The first, being chapter 1080 of the local

laws of that year, applied to this district alone. The second, being chapter 278 of the general laws of that year, applied broadly to all districts in the situation of this one, and to others.

After the enactment of the confirmatory measures the commissioners, with the approval of the board of supervisors, designated two roads—one branching from the other—as the ones to be constructed and maintained out of the proceeds of the bonds; and in due course the work of construction was begun and carried to completion.

In November, 1926, the board of supervisors, at the request of the commissioners, levied on all taxable property, real and personal, within the district an ad valorem tax to meet the first instalment of interest and principal upon the bonds, that instalment being payable in the following February. The tax was four-tenths of one per cent of the assessed value of the property as fixed for state and county taxes. The amount so charged on the appellant's property was about $450, and this is the tax against which the suit is directed.

The Supreme Court of the State in the decision under review holds that the creation of the road district, the issue of the bonds and the levy of the tax were all valid under the state constitution and the acts before cited; that the board of supervisors in creating the district acted in a legislative capacity, they being invested by the constitution and statutes of the state with discretion to create the district, or refuse to create it, according to their judgment of the best interests of all concerned; and that the two confirmatory acts were valid under the state constitution and operated to make the district a legislatively created district if it was not such before. These were all questions of state law, and their decision by that court is controlling here.

Counsel for the appellant so understand the situation, for in their last brief they say "that it [appellant] and this Court are bound by the decision of the State's highest court relating to the state constitution and state statutes and that it is no longer possible here for appellant to contend that the district was invalidly organized or that the special validating act approved as constitutional under the constitution of Mississippi did not serve to place the Oldham road district in the class of legislatively created districts." And also that "the Supreme Court of Mississippi in the

decision below expressly held that the board of supervisors of a Mississippi county was vested with authority to deny the petition to create the district. Districts thus created, within the discretion of the board of supervisors, are, therefore, under this decision, equivalent to legislatively created districts, and hence a taxpayer whose property is included therein is not entitled to notice and hearing within the doctrine aforesaid of *Browning* v. *Hooper,* [269 U. S. 396]."

The only question presented in the Supreme Court of the State which is open here is whether the act of 1920 and the confirmatory acts of 1926, as construed and applied in this case, are invalid as authorizing the imposition of a tax which is so palpably arbitrary and unreasonably discriminatory that it offends the due process and equal protection clauses of the Fourteenth Amendment.

On the part of the appellant the tax is said to be thus objectionable, because it is imposed to pay for local road improvements and is not apportioned according to benefits but is laid upon all the property, real and personal, within the district on an ad valorem basis; because the property of the appellant, and particularly its personal property, receives no benefit from the improvements; and because, even if there be some benefit to the appellant's property, the tax laid thereon is disproportionate to the benefit and to the tax laid on other property.

The construction and maintenance of serviceable roads in any community is a matter in which the whole community have an interest and is a typical public purpose for which property may be taxed by the State. *Missouri Pacific R. R. Co.* v. *Crawford Road District,* 266 U. S. 187, 190. Whether the tax shall be state wide or confined to the county or local district wherein the improvement is made, and whether it shall be laid generally on all property or all real property within the taxing unit, or shall be laid only on real property specially benefited, are matters which rest in the discretion of the State, and are not controlled by either the due process or the equal protection clause of the Fourteenth Amendment. *County of Mobile* v. *Kimball,* 102 U. S. 691, 703; *Spencer* v. *Merchant,* 125 U. S. 345, 355-356; *Houck* v. *Little River District,* 239 U. S. 254, 262, 265; *Valley Farms Co.* v. *Westchester,* 261 U. S. 155; *Missouri Pacific R. R. Co.* v. *Crawford Road District, supra: Kansas City Southern Ry. Co.* v. *Road Improvement District No. 3,* 266 U. S. 379, 386.

But, however the tax may be laid, if it be palpably arbitrary, and therefore a plain abuse of power, it falls within the condemnation of the due process clause, *Houck* v. *Little River District, supra*; *Valley Farms Co.* v. *Westchester, supra;* and if it be manifestly and unreasonably discriminatory it falls within the condemnation of the equal protection clause. *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55; *Kansas City Southern Ry. Co.* v. *Road Improvement District No. 6*, 256 U. S. 658; *Thomas* v. *Kansas City Southern Ry. Co.*, 261 U. S. 481; *Road Improvement District No. 1* v. *Missouri Pacific R. R. Co.*, 274 U. S. 188.

Where the tax is laid generally on all property or all real property within the taxing unit, it does not become arbitrary or discriminatory merely because it is spread over such property on an ad valorem basis; nor where the tax is thus general and ad valorem does its validity depend upon the receipt of some special benefit as distinguished from the general benefit to the community. *St. Louis & Southwestern Ry. Co.* v. *Nattin*, 277 U. S. 157; *Valley Farms Co.* v. *Westchester, supra; Houck* v. *Little River District, supra; Miller & Lux* v. *Sacremento Drainage District*, 256 U. S. 129; *Missouri & Pacific R. R. Co.* v. *Crawford Road District, supra.*

The Oldham road district was created, not as a temporary expedient to accomplish a particular road improvement and defray the cost of that work, but as a permanent agency invested with continuing authority to provide and maintain suitable district roads under the supervision of the county board. The state laws provide for accomplishing road improvements and paying therefor in two distinct ways—one through special benefit assessment districts and the other through established local districts authorized to defray the cost by general taxes. In the decision under review the Supreme Court of the State holds that the Oldham district is "not a special benefit assessment district" but one wherein road improvement expenses and bonds issued therefor are to be paid by general taxes.

The district is rural, comprises four full sections of land and fractions of two sections, 2950 acres in all, and is about two miles wide and two and a half miles long. The railroad of the appellant extends through the southerly part of the district for about two miles and for about a half mile more lies just inside the southerly line. The appellant's property in the district consists of right of

way, 2.88 miles of main track, 2.69 miles of side track, section house site and a small fraction of its rolling stock. The value of this property as assessed for state and county taxes was $113,200, and the value of other property in the district as so assessed was $68,246, making a total of $181,446. These valuations are not questioned here.

When the district was organized it was not far advanced or well developed. Along the appellant's railroad were two large and extensively worked gravel pits with an output of about 8,000 cars a year, which were being shipped over the appellant's railroad and were bringing it a gross yearly return of about $250,000. The gravel was of superior quality, of almost inexhaustible quantity, and in much demand. Relatively small quantities of pulpwood and lumber were also being shipped from the district over the appellant's railroad in car load lots. Grain and other products of the district destined to be shipped away usually were hauled by the producers to a nearby town which was on the appellant's railroad and without other railroad facilities. The Lee Highway, a good road leading to that town, crossed the most southerly part of the district south of and near the appellant's railroad. Another good road leading to the same town lay north of the district. But, apart from the Lee Highway, the roads then in the district were not good at any time and in some seasons were almost impassable.

When the bonds were voted, issued and sold it was not known what road or roads would be constructed with the proceeds, for as yet no road had been selected. Under the state law that matter remained open until the selection was made by the commissioners and approved by the county supervisors. *Board of Supervisors* v. *Callender,* 128 Miss. 159.

The roads ultimately selected and actually constructed are in the form of an inverted Y with the stem extending to the northerly line of the district and the arms extending to the two gravel pits and the adjacent side tracks of the appellant's railroad near the southerly line. From each arm there is a connection with the Lee Highway near the southern border of the district and at the other end of the stem there is a connection leading to the road on the north. The roads so constructed are not parallel to the appellant's railroad, but practically at right angles to it.

The appellant sought by its evidence to prove that these roads could be of no benefit whatever to it. Part of this evidence tended merely to show that railroads receive no benefit from public roads running parallel to them, and so was not in point. And much of it came from witnesses whose knowledge of the relevant conditions within the district and surrounding it was so meagre that little weight could be accorded to their testimony. On the other hand, the appellees produced witnesses having some familiarity with the district and its surroundings whose testimony, although open to some criticism, tended to show that the roads would be of real benefit to the appellant both by enabling it to retain old business and by bringing new business to it. Both state courts found that there would be appreciable benefit, and we think their finding has such support in the evidence that it should not be disturbed.

Upon applying the settled rules before stated to the case presented, we are of opinion that the appellant has not shown that the tax imposed under the sanction of the state statutes is either palpably arbitrary or unreasonably discriminatory. It was imposed for what obviously is a public purpose. It was a general tax and admissibly was spread over all the taxable property in the district according to the value thereof as fixed by the assessment for state and county taxes. The appellant was afforded ample opportunity by the state law to be heard on that assessment and to have it corrected if erroneous or unfair, and is not challenging it now. The chief complaint made here is that the imposition of the tax on an ad valorem basis was "inherently invalid" under the due process and equal protection clauses. That complaint is not tenable, as is shown in several cases before cited. And, as the tax was general and ad valorem, its validity, as was held in *St. Louis & Southwestern Ry. Co.* v. *Nattin, supra,* "does not depend upon the receipt of any *special* benefit by the taxpayer."

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.